

No 385

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FILED

AUG 22 1941

CHARLES ELMORE DROPLEY  
CLERK

**PLEADINGS IN U. S. CIRCUIT COURT OF  
APPEALS.**

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**United States Circuit Court of Appeals  
EIGHTH CIRCUIT.**

—  
**No. 12,782**  
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**J. L. BRANDEIS & SONS, A NEBRASKA  
CORPORATION, PETITIONER,**

**vs.**

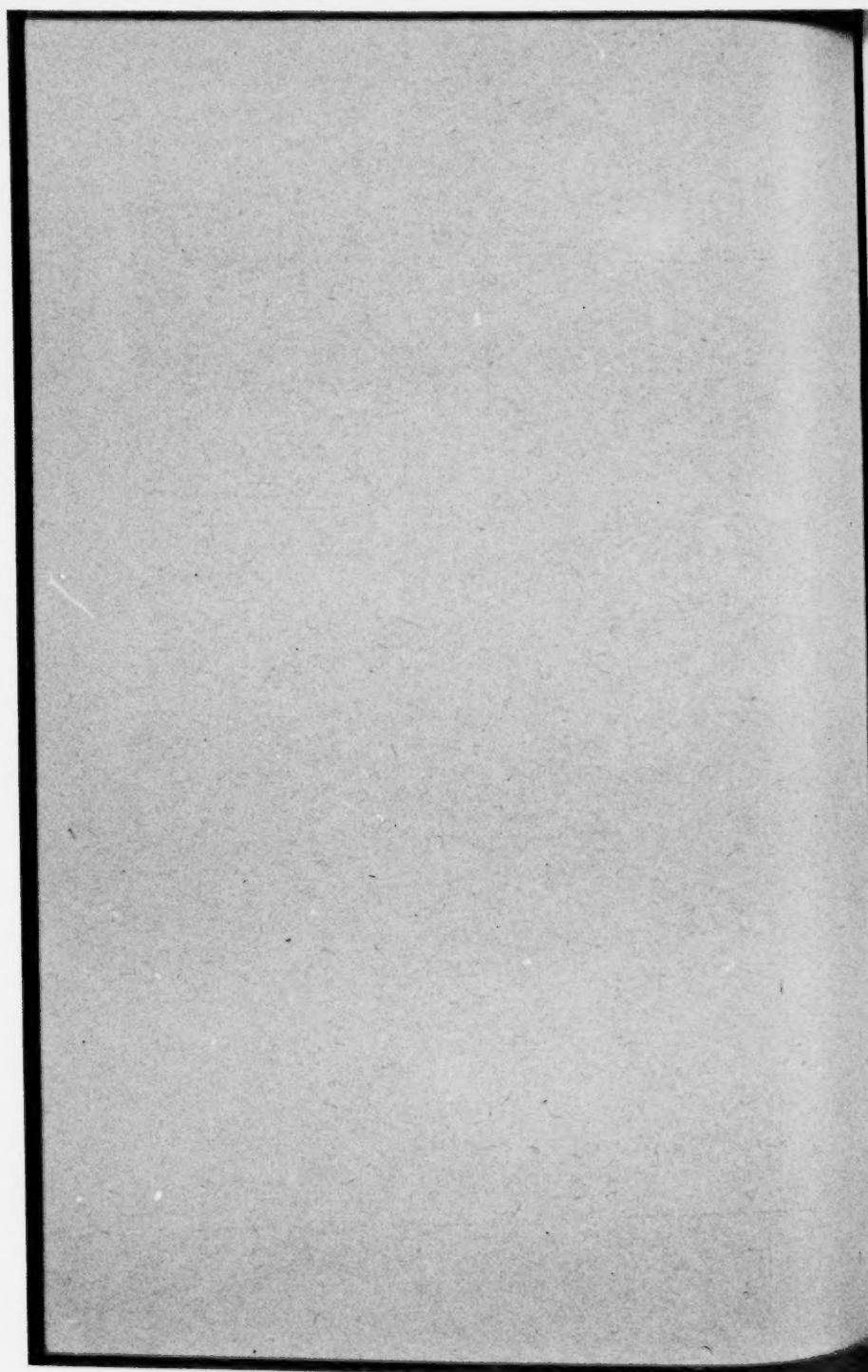
**NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.**

—

**ON PETITION TO REVIEW ORDER OF NATIONAL LABOR  
RELATIONS BOARD.**

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[fol. 3] And thereafter the following proceedings were had  
in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Petitioner.)

United States Circuit Court of Appeals,  
Eighth Circuit.

J. L. Brandeis & Sons, Petitioner,  
No. 12,782 vs.  
National Labor Relations Board.

The Clerk will enter my appearance as Counsel for the  
Petitioner.

J. A. C. KENNEDY,  
YALE C. HOLLAND,  
GEORGE L. DELACY,  
RALPH E. SVOBODA,  
HARRY R. HENATSCHEK.

(Endorsed): Filed in U. S. Circuit Court of Appeals,  
Dec. 27, 1943.

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[fol. 4] (Appearance of Mr. Robert B. Watts and Mr.  
Howard Lichtenstein as Counsel for Respondent.)

The Clerk will enter my appearance as Counsel for the  
Respondent.

ROBERT B. WATTS,  
General Counsel.

HOWARD LICHTENSTEIN,  
Assistant General Counsel  
National Labor Relations  
Board.

(Endorsed): Filed in U. S. Circuit Court of Appeals,  
Dec. 10, 1943.

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(Appearance of Mr. Roman Beck as Counsel for  
Respondent.)

The Clerk will enter my appearance as Counsel for the  
Respondent.

ROMAN BECK.

(Endorsed): Filed in U. S. Circuit Court of Appeals,  
May 4, 1944.

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[fol. 5]

(Order of Submission.)

May Term, 1944.

Thursday, May 4, 1944.

This matter having been called for hearing in its regular order, argument was commenced by Mr. Ralph E. Svoboda for petitioner, continued by Mr. Roman Beck, Attorney, National Labor Relations Board, for respondent, and concluded by Mr. Ralph E. Svoboda for petitioner.

Thereupon, this matter was submitted to the Court on the petition to review order of the National Labor Relations Board, the answer thereto, the pleadings and proceedings before said Board and the briefs of counsel filed herein, with leave to file reply brief of petitioner within five days from this date.

[fol. 6]

(Opinion.)

United States Circuit Court of Appeals.  
Eighth Circuit.

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No. 12,782.

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J. L. Brandeis & Sons, a Nebraska Corporation,

Petitioner,

vs.

National Labor Relations Board,  
Respondent.

} On Petition to Review  
and Set Aside  
Order of the National Labor Relations Board.

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[June 7, 1944.]

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Mr. Ralph E. Svoboda (Mr. J. A. C. Kennedy, Mr. Yale C. Holland, Mr. George L. DeLacy, Messrs. Kennedy, Holland, DeLacy & Svoboda, Mr. L. J. Tierney and Mr. Harry R. Henatsch were with him on the brief) for Petitioner.

Mr. Roman Beck (Mr. Alvin J. Rockwell, General Counsel, Mr. Malcolm F. Halliday, Associate General Counsel, and Mr. Thomas B. Sweeney, Attorney, National Labor Relations Board, were with him on the brief) for Respondent.

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Before STONE, SANBORN and THOMAS, Circuit Judges.

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THOMAS, Circuit Judge, delivered the opinion of the court.

This case, submitted upon a petition of J. L. Brandeis & Sons to review and annul a decision and order of the National Labor Relations Board and a request of the Board for enforcement of its order, presents only two questions, namely, (1) the jurisdiction of the Board and (2) the appropriate unit for collective bargaining.

The petitioner refused to bargain collectively with a labor union certified by the Board as the exclusive representative of petitioner's employees in a unit previously found to be appropriate for such purpose. The union filed charges, a complaint was issued and petitioner answered, denying that it was subject to the Act and alleging that the unit determined was not appropriate. The issues were submitted upon a stipulated record and the Board found that the petitioner refused to bargain collectively with the union in violation of § 8(5) and (1) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. 1940 ed. §§ 151 et seq.) and ordered the petitioner to cease and desist from such unfair labor practice and to bargain with the union upon request.

The petitioner is a Nebraska corporation engaged in owning and operating a retail department store in the city of Omaha in that state. The principal store occupies half a block and has ten floors and a basement. The base-

ment and first seven floors are devoted to merchandising and the three upper floors are used for service departments and an assembly hall. The petitioner also operates, as departments of its store, two drug stores in other buildings; leases five floors of another building for warehousing, another building as a garage, carpenter, paint and repair shop, and another which supplies heat for the main store.

The store comprises 99 departments and 18 additional departments leased to other persons but held out to the public as departments of the store. In these 117 departments the petitioner has 984 employees and offers for sale to the public thousands of items and services to satisfy personal and household needs and desires.

During the fiscal year ending January 21, 1943, the petitioner purchased merchandise outside of Nebraska for resale at its store in Omaha at a cost of more than \$3,700,000. For the fiscal year ending January 31, 1943, its mail orders were estimated to amount in value to \$121,274, of which approximately \$20,799 represented mail order sales to customers outside the state of Nebraska. During the same period it caused to be delivered to out-of-state customers approximately 8,900 packages.

The petitioner does not advertise on a nation-wide basis. It advertises in the Omaha World Herald which has a circulation of approximately 164,000 in Nebraska and 21,000 in Iowa. It also advertises in the Non Pareil, a newspaper published and circulated in Council Bluffs, Iowa.

The petitioner contends that the Board is without jurisdiction for the reasons (1) that the National Labor Relations Act does not apply to labor disputes in retail department stores; (2) that the doctrine of *de minimis* is applicable to its interstate sales, and that such sales are

so small that to close the store would not have a direct and substantial effect upon interstate commerce; and (3) that the purchase and shipment of merchandise from outside the state for stocking the shelves of its store is not interstate commerce and should not be considered in determining the jurisdiction of the Board.

These contentions are supported by an exhaustive brief, but the arguments do not persuade. The Act does not exempt the retail business as such from the scope of its coverage. Section 10(a) provides that "The Board is empowered . . . to prevent *any person* from engaging in any unfair labor practice . . . affecting commerce." (Italics supplied.) The only test of the applicability of § 10(a) of the Act to any business or enterprise is found in § 2(7), which provides that "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 220-223.

It is argued that the Act applies only to industries and that selling merchandise at retail is not an industry. Conceding *arguendo* that the law applies only to labor relations in industry, it can not be successfully maintained that the retail business is outside the scope of the meaning of that term. One of the definitions of industry given in Webster's International Dictionary (1942 ed.) is "any department or branch of . . . business . . . which employs much labor and capital and is a distinct branch of trade." The selling of merchandise at retail is such a business.

Petitioner concedes that the Act may apply to department stores "enormous" in character or of "vast" operations, giving them "national" character, citing as illustra-

tions *National Labor Relations Board v. J. L. Hudson Co.*, 6 Cir., 135 F.2d 380, cert. den. 320 U.S. 740; *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U.S. 453, 463; and *National Labor Relations Board v. Bank of America Natl. Trust & Savings Assn.*, 9 Cir., 130 F.2d 624. Clearly the inference sought to be drawn from these cases is not warranted. The adjectives quoted are used in each instance as descriptive only of the facts involved and not as limiting the reach of the law or the powers of Congress.

It is vigorously contended that the maxim "de minimis non curat lex" is applicable to petitioner's interstate sales and that the stoppage of such sales by strikes or otherwise would not affect commerce in any substantial way. In support of this argument it is pointed out that the petitioner's out-of-state mail order sales of \$20,000 for the year ending January 31, 1943, amount to only .0024 per cent. of its total sales estimated to be \$8,500,000 for the year; that the 8,900 packages sent to out-of-state customers during the year is but 4 per cent. of the number of packages delivered in Omaha for the same period; and that the charge accounts to out-of-state customers represent less than 2 per cent. of total sales for the year. It is further said that of the 2.2 per cent. of total sales made to out-of-state customers during the year over half such sales were made on the store premises.

The courts have frequently held that the Act "can not be applied by a mere reference to percentages." *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, *supra*, at p. 467; *National Labor Relations Board v. Fainblatt*, 306 U.S. 601, 607-608; *National Labor Relations Board v. Crowe Coal Co.*, 8 Cir., 104 F.2d 633, 639; *National Labor Relations Board v. Central Mo. Tel. Co.*, 8 Cir., 115 F.2d 563, 566; *National Labor Relations Board v. J. G. Boswell Co.*, 9 Cir., 136 F.2d 585, 589. The application of the Act does not depend upon the magnitude of

the business nor the comparative amount of interstate sales. The test of the Board's jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of such a relationship between the employer and his employees to commerce that an unfair labor practice would lead or tend to lead to a labor dispute burdening or obstructing the free flow of commerce. Sections 10(a) and 2(7); *National Labor Relations Board v. Fairblatt, supra*. In brief, the jurisdictional test in such a case as the present one is whether the stoppage of the business by reason of labor strife would tend substantially to affect interstate commerce. The principle applicable is one of degree. When the unfair labor practice involved is found to have such a close and substantial relation to the free flow of interstate commerce that the practice tends to obstruct that commerce, the jurisdiction of the Board to apply the preventive remedies of the Act is undoubted.

The foregoing rules indicate the scope of the Board's jurisdiction under the Act whether the labor dispute involved occurs in a manufacturing establishment, a mining enterprise, a banking or a retail mercantile business.

So far we have considered only the effect of the sales of merchandise by petitioner to out-of-state customers. The Board, however, relied also upon the purchases of merchandise for stocking the store from points outside the state. It is stipulated that for the year ending January 31, 1943, the petitioner purchased merchandise for resale at a cost of \$4,941,236, of which about 75 per cent. was purchased and shipped to it from outside the state of Nebraska. The contention is that the Board erred in taking these outside purchases and shipments into consideration. Clearly if a strike of the employees in the store should lead to the closing of its doors and stop the selling of merchandise the flow of supplies from outside the state would soon stop also. The effect upon commerce would be close and substantial. But the petitioner says such a

labor dispute would serve only to shift local commerce to competing stores and would not affect the flow of interstate commerce. A similar contention was urged in *National Labor Relations Board v. Bradford Dyeing Assn.*, 310 U.S. 318, 326, and the Supreme Court held that the fact that the employer's customers might be able to secure the same services elsewhere was not material. The basis of the contention is conjectural; but, even if true, it does not prove that a shut-down of the store would not substantially affect the flow of interstate commerce.

It is urged, also, that when shipments of out-of-state merchandise come to rest in the store interstate commerce ends and that what may occur thereafter does not directly affect it. The argument is unsound. If when selling at the store stops purchasing outside the state also stops, it is fair to say that the latter is the effect of the former. See *National Labor Relations Board v. J. L. Hudson Co.*, *supra*; *Canyon Corporation v. National Labor Relations Board*, 8 Cir., 128 F.2d 953; *National Labor Relations Board v. Robert S. Green, Inc.*, 4 Cir., 125 F.2d 485; *National Labor Relations Board v. Kudile*, 3 Cir., 130 F.2d 615, cert. den. 317 U.S. 694; *National Labor Relations Board v. Suburban Lumber Co.*, 3 Cir., 121 F.2d 829, 831, cert. den. 314 U. S. 693. In determining its own jurisdiction the Board properly considered the possible effect of labor strife in the store upon the flow of merchandise purchased and shipped from outside the state to maintain the constantly diminishing stock offered for sale at retail. In the cases cited *supra* both the inflow and the outflow of commerce were considered in determining jurisdiction.

The petitioner's second contention is that, even though subject to the jurisdiction of the Board, its refusal to bargain with the union does not violate the Act because the bargaining unit certified by the Board is not appropriate.

The Board found that all the employees in the store engaged in the alteration of men's, boys' and women's

clothing (comprising alteration department 36 and department 82), excluding supervisory employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act.

The petitioner contends that the bargaining unit should be store-wide because there is a centralized management of the store. All employees are paid on a weekly basis; hours of work are the same throughout the store; the labor policy of the store is set by three top executives; vacations, pensions, pay days, bonuses, sick benefits, social activities, labor disputes, and the like are all on a store-wide basis; and the management prefers a store-wide unit.

The employees in the two alteration departments are organized in Local No. 285 of the Amalgamated Clothing Workers of America, affiliated with the C.I.O. The employees involved are tailors, pressers, seamstresses and fitters, and journeymen-tailors, with duties distinct from those of any other employees in the store. They are generally considered as belonging to a skilled trade, having interests separate from those of other employees of the store. The union confines its membership to such units; and it has been bargaining on behalf of such employees since long before the passage of the Act.

Section 9(b) of the Act provides that "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof." The standard of determination prescribed is that the selection of the unit must be appropriate "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act."

Clearly the question here "is one of specific application of a broad statutory term in a proceeding in which" the

Board "must determine it initially." The Board's decision in such a case must be accepted by a reviewing court "if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board v. Hearst Publications, Inc.*, . . . . . U.S. . . . ., 88 L. ed. 824, 835. See, also, *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 8 Cir., 113 F.2d 698, 701, aff'd 313 U.S. 146; *Bussman Mfg. Co. v. National Labor Relations Board*, 8 Cir., 111 F.2d 783, 785; *National Labor Relations Board v. Lund*, 8 Cir., 103 F.2d 815, 819. In the *Pittsburgh Plate Glass Co. case*, *supra*, this court said in reference to the discretion of the Board under § 9(b), "The decision of the Board is conclusive unless arbitrary or capricious."

The petitioner has failed to show that the decision of the Board in this instance is either arbitrary or capricious. The duty of the Board under the Act to insure to the employees the full benefit of their right to self-organization furnishes a reasonable basis in law, and the separate functional duties of the employees in the two departments involved constitute a rational basis in fact for the finding that they constitute an appropriate unit for the purpose of collective bargaining.

The order is affirmed and a decree enforcing it will be entered.

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[fol. 15]

(Decree.)

In the United States Circuit Court of Appeals,  
for the Eighth Circuit.

May Term, 1944.

Friday, June 23, 1944.

J. L. Brandeis & Sons, a Corporation, Petitioner,  
No. 12,782 vs.  
National Labor Relations Board.

On Petition to Review and on Request for Enforcement of  
an Order of the National Labor Relations Board.

Before Stone, Sanborn and Thomas, Circuit Judges.

The National Labor Relations Board, having on November 3, 1943, issued an order against J. L. Brandeis & Sons, the said J. L. Brandeis & Sons, having petitioned this Court to review said order, and the Board having requested this Court to enforce said order, and this Court having considered the same and having on June 7, 1944, issued its decision enforcing said order,

It is hereby Ordered, Adjudged and Decreed that Petitioner, J. L. Brandeis & Sons, Omaha, Nebraska, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local No. 285, Amalgamated Clothing Workers of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all employees of the petitioner engaged in the alteration of men's, boys' and women's clothing (comprising alteration department 36, and department 82), excluding supervisory employees having the right to hire and discharge, the manager and assistant manager of alteration department 36 (the women's alteration department), and the head tailor in department 82 (the men's alteration department);

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local No. 285, Amalgamated Clothing Workers of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all employees of the petitioner engaged in the alteration of men's, boys' and women's clothing (comprising alteration department 36, and department 82), excluding supervisory employees having the right to hire and discharge, the manager and assistant manager of alteration department 36 (the women's alter-

ation department), and the head tailor in department 82 (the men's alteration department), in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately notices to its employees in conspicuous places in and about its department store at Omaha, Nebraska, where they can be readily seen by the employees above-described, and maintain for a period of [fol. 17] at least sixty (60) days from the date of posting, stating: (1) that the petitioner will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Decree; and (2) that the petitioner will take the affirmative action required by paragraph 2 (a) of this Decree;

(c) Notify the Regional Director for the Seventeenth Region of the National Labor Relations Board in writing within ten (10) days from the date of issuance of a certified copy of this Decree what steps the petitioner has taken to comply herewith.

June 23, 1944.

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(Motion of Petitioner to Stay Issuance of Certified Copy of Decree.)

To the Honorable, the Judges of the Circuit Court of Appeals, In and For the Eighth Circuit:

Your Petitioner, J. L. Brandeis & Sons, respectfully presents this its Petition for an Order Staying the Execution and Enforcement of the Decree of the United States Circuit Court of Appeals in and for the Eighth Circuit, rendered in the above cause on the 23rd day of June, 1944, under the provisions of Section 350 of Title 28 of the United States Code, by withholding and staying the issuance of a Mandate Procedendo, or of a certified copy of such Decree of this Honorable Court, to the National Labor Relations Board to enable the said Petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the [fol. 18] United States within ninety days from the date

of such Decree aforesaid, it being the bona fide intention of the Petitioner to make such Application to the said Supreme Court of the United States.

The grounds upon which such Petition for Certiorari will be based, will include—

(1) The decision of this Honorable Court is in conflict with a decision in a like matter of another United States Circuit Court of Appeals.

(2) The Circuit Court of Appeals of the Eighth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of the United States Supreme Court.

(3) The question of jurisdiction over retail department stores under the National Labor Relations Act is of great importance to the vast body of interstate businesses which draw on sources outside of the State in which they operate for a part of the merchandise with which they stock their shelves.

among others.

The reasons why a stay is deemed necessary include the necessity of preserving such jurisdictional issue in a companion case, No. 12,891, involving the same Petitioner, but different employees and different unions in which such jurisdictional issue was likewise raised, as well as precluding the jurisdictional issue becoming academic and moot by the enforcement of the above Decree of this Court before the United States Supreme Court can pass upon the Petition for Certiorari intended to be filed.

This Honorable Court should, therefore, stay the issuance of a Mandate Procedendo or of a certified copy of the [fol. 19] above Decree to the National Labor Relations Board until the Petitioner has applied for and obtained a Writ of Certiorari from the United States Supreme Court, or until a final decision in the said latter court, if certiorari is granted, provided Petitioner makes Application for such Writ of Certiorari within ninety days from the foregoing Decree of this Court.

Dated at Omaha, Nebraska, this 15th day of July, 1944.

J. L. BRANDEIS & SONS,  
By J. A. C. Kennedy,  
Yale C. Holland,  
Geo. L. DeLacy,  
Ralph E. Svoboda,  
Its Attorneys.

Of Counsel:

Kennedy, Holland, DeLacy & Svoboda,  
1501-18 City National Bank Building,  
Omaha, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals,  
Jul. 17, 1944.

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(Order Staying Issuance of Certified Copy of Decree to  
Labor Board, etc.)

May Term, 1944.

Tuesday, July 18, 1944.

On Consideration of the petition of petitioner to stay the issuance of a certified copy of the decree of this Court to the Respondent, National Labor Relations Board, in this [fol. 20] cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that the issuance of a certified copy of the Decree to the Respondent herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 18, 1944.

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[fol. 21]

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains Record printed March 24, 1944, consisting of Petition to Review Order of National Labor Relations Board, the Answer of National Labor Relations Board, and the Pleadings before the Board, and Record printed March 30, 1944, consisting of Volumes 1 and 2, as an Appendix to the Brief of Petitioner, on which the matter was heard in said Circuit Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain matter in said Circuit Court of Appeals wherein J. L. Brandeis & Sons, a Nebraska Corporation, was Petitioner and the National Labor Relations Board was Respondent, No. 12,782.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 20th day of July, A. D. 1944.

(Seal)

E. E. KOCH,  
Clerk of the United States Circuit  
Court of Appeals for the Eighth  
Circuit.

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**IN THE**  
**Supreme Court of the United States**

October Term, 1943

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No. —

— o — o —

J. L. BRANDEIS & SONS,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

— o — o —

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT,  
AND  
BRIEF IN SUPPORT THEREOF**

— o — o —

J. A. C. KENNEDY,  
GEORGE L. DELACY,  
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1501-18 City National Bank Building,  
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YALE C. HOLLAND,  
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Omaha, Nebraska,  
*Of Counsel.*



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**IN THE  
Supreme Court of the United States**

**October Term, 1943**

— o — o —

**No.** —

— o — o —

**J. L. BRANDEIS & SONS,**

*Petitioner,*

**vs.**

**NATIONAL LABOR RELATIONS BOARD,**  
*Respondent.*

— o — o —

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT,  
AND  
BRIEF IN SUPPORT THEREOF**

— o — o —

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT**

*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Your Petitioner, J. L. Brandeis & Sons, respectfully  
shows:

## A. SUMMARY STATEMENT OF THE MATTER INVOLVED\*

But one issue is presented to this Honorable Court<sup>1</sup>—that as to the application of the National Labor Relations (familiarily known as the Wagner) Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.), hereafter referred to as the Act, to a local retail department store operation, as exemplified by the Petitioner's store in this case, and, consequently, to a local merchandising activity, heretofore generally conceived to be within that "host of local enterprises" authoritatively held to be outside of the purview of the Act.<sup>2</sup> The sole issue is, therefore, one of jurisdiction under that Act, namely, whether such an operation or activity—consisting of over-the-counter sales on the store premises—is in interstate commerce or affects interstate commerce, so that it may be said that a question "affecting commerce" within Sec. 10 of the Act has arisen.

It is the contention of the Petitioner, hereafter sometimes referred to as the Store, that the outposts of the National Labor Relations Board's jurisdiction have been passed or exceeded by the Board in a case involving such an essentially local operation or activity—the Petitioner

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\*References to the Record, which is in four volumes, are by the letter R, followed by the volume number (1, 2, 2a or 3) and, then, the page or pages.

<sup>1</sup>A second, or subordinate, issue of the propriety of the Appropriate Unit, as found by the Board and confirmed by the lower Court, may be conceded not to be of influence on the grant of certiorari.

<sup>2</sup>*National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U. S. 1, loc. cit. 41, 81 L. Ed. 893, loc. cit. 914.

store corporation being representative of over 4,000<sup>3</sup> like department stores (having over \$100,000 in annual sales volume)<sup>4</sup> throughout the country.

The proceeding arose before the National Labor Relations Board, hereafter referred to as the Board, by the usual Charge (R1-27) and Complaint (R1-29), to which the Petitioner urged the jurisdictional obstacle by Answer (R1-33). Following a Decision and Order of the Board (R1-67) adverse to the Petitioner on such jurisdictional issue, the Petitioner sought review in the Circuit Court of Appeals (R1-1), again challenging the Board's jurisdiction. That Court affirmed the Board (R3-4 and 12).

The test arises over the effort by the Respondent, in an original proceeding, to ascribe an Unfair Labor Practice to the Petitioner in refusing to bargain with a Certified Union in an Appropriate Unit of the Store, composed of only 26 (almost all women) out of 984 employees in only 2 Alteration (out of 117) Departments of the Store.

The subjects of inquiry are, therefore, (a) the character of the Petitioner's retail department store—preeminently an intrastate activity—as being in or substantially affecting interstate commerce vel non, and (b) the effect of a Labor Dispute in the foregoing limited Appropriate Unit, as threatening a burden or obstruction to

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<sup>3</sup>Bulletin for 1941 of the Harvard Bureau of Business Research shown in Stipulation of Parties (R1-41).

<sup>4</sup>Department Stores, in turn, are roughly 16% of all the retail stores in the country—63% being independent or community stores. **State Board of Tax Commissioners v. Jackson**, 283 U. S. 527, 533, 75 L. Ed. 1248, 1254. The tremendous impact of such foray into this retail area is, consequently, self-evident.

such interstate commerce, as alleged by the Board (R1-28 and 31).

As to the general character of the Store of the Petitioner, (a) above, a paraphrase of the lower Court's recital of the facts will suffice for the purpose of this Petition (R3-4). The Petitioner is a Nebraska corporation engaged in owning and operating a retail department store in the city of Omaha. The principal store occupies one-half block and has 10 floors and a basement, the basement and first 7 floors being devoted to merchandising and the 3 upper floors being used for service departments and an assembly hall. 2 drug stores in nearby buildings are also operated as departments of the Store. 5 floors of still another building are leased for warehousing and a garage, carpenter and paint shop are contained in another building, from which is supplied heat for the main Store. In the 117 Departments of the Store (99 owned and 18 leased) are exposed for sale to the public and sold over the counter on the Store premises the usual items of personal and household goods traditional to like department stores.

That the Store in this case does not differ essentially from similar institutions, such as the Corner Grocery Store or Corner Drug Store, cannot be gainsaid, because the criteria applied by the lower Court—criteria which metamorphose a manifestly local or intrastate activity into its strange antithesis—are of equal and pervasive application to such similar merchandising enterprises. It is for these reasons that the Petitioner here seeks certiorari, viz., because the case is representative of the entire field of retail operations, as commonly conducted, and because, it is submitted, the criteria as so applied by the Circuit Court of Appeals are fundamentally and authoritatively unsound.

These criteria (the burden of proof of the affirmative of which rested upon the Respondent Board) comprise—

- (1) Whether purchases outside of the State, for the stocking of the shelves of the local merchant in the customary manner, give the otherwise local selling operations of the Store a national aspect, furnishing a jurisdictional base for application of the Act.<sup>5</sup>

It is submitted that this cannot be the test, as a like test would corral within the Act every retail store operation in the country—down to the most insignificant Corner Hardware Store or Grocery Store.

- (2) Whether a negligible quantum of sales other than on the immediate Store premises—approximately 99% of the Store's business<sup>6</sup> being wholly intrastate—transforms an otherwise essentially local sales operation into an interstate operation.

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<sup>5</sup>The Petitioner purchased merchandise for resale for the year ending January, 1943, at a cost of \$4,941,236, of which about 75% was purchased and shipped to it from outside of the State (R2-34, 38 and R1-40).

<sup>6</sup>Approximately 1.45% (or 66% of 2.2%) of the sales to the minimal out-of-state customers were sales actually transacted over the counter and there completed (Co.'s Exh. 7C, R2a-513, 514, and Co.'s Exh. 5C, R2a-512, and see R2-44 to 47, 50 to 53, 74, 252 and 260 to 263). Mail orders resulting from negligible telephone orders or on account of merchandise sent away as gifts to relatives, to customers on vacations or to children away in school (R2-46, 65) were only .0024% of all the retail sales (Co.'s Exh. 6C, R2a-513 and see R2-47 and 252 to 253). There are no deliveries by store facilities out of the State (R2-25, 40, 48 to 49 and 256 to 260), and delivery by out-of-state independent express facilities are only 3.7% of the total deliveries (or 8/10 of 1% of total sales), or around 29 a day compared to over 400,000 of all the Store's local deliveries in a year (Co.'s Exh. 6½C, R2a-513 and see R2-49 and 102). The advertising of the Store in newspapers, one with a small Iowa circulation (1/9 of the Omaha World-Herald's, R2-26) and the other in the Council Bluffs Nonpareil (representing only 1/60 of the Store's advertising budget—Co.'s Exh. 2C, R2a-511 and see R2-17 to 22, 26 and 250), only solicited local or intrastate sales (R2-103), as is further demonstrated by the negligible out-of-state sales.

It is submitted that such a small "interstate" volume is definitely in the "de minimis" category, but if applied as a test, would likewise embrace the operations of practically all retail stores within the Act.

- (3) Whether considerations of the smallness of a store's operations, as opposed to the vastness of other stores, are immaterial<sup>7</sup> on the jurisdictional question.

It is submitted that a sweeping envelopment of all retail operations, both small and large, is unrealistic and completely erases the distinction of local, as against settled, interstate characters of operations.

- (4) Whether the Act, therefore, applies to a retail store operation of ordinary proportions, not trenching upon the national field in some well-recognized respect, absent as to this Store and other like stores.

And that is the nub of this case.

As to the effect of a Labor Dispute, in the afore-delineated Appropriate Unit in a Store of the character here portrayed—in the aspect of threatening a burden or obstruction to interstate commerce, as alleged by the Board, as a prerequisite to a finding of an Unfair Labor Practice, (b) above—the record is likewise undisputed.<sup>8</sup> That the two alteration departments could close and the Store's operation not be affected at all, because of the non-essential character of the departments (R2-151 to

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<sup>7</sup>The Petitioner in this case is not a chain, mail-order house, or national emporium employing catalogs or federal trademarks or national advertising,—which set such institutions apart in the retail merchandise field, as being conducted on a nation-wide scale and having national aspects not in common with the Petitioner's Store in this case. Cf. *Liggett Company v. Lee*, 288 U. S. 517, 532, 77 L. ed. 929, 936.

<sup>8</sup>On all jurisdictional aspects, the evidence here, as elsewhere, was without conflict, as it proceeded only from Petitioner's witness.

152),<sup>9</sup> is apparent upon an appraisal of the effects on interstate commerce of a visualization of such Labor Dispute. It, therefore, leaves void a necessary prerequisite to the exercise of jurisdiction under the Act.

**B. STATEMENT DISCLOSING THE BASIS UPON  
WHICH THIS COURT HAS JURISDICTION  
TO REVIEW THE DECREE OF THE  
CIRCUIT COURT OF APPEALS**

(a) It is contended that this Honorable Court has jurisdiction to review the Decree of the Circuit Court of Appeals for the Eighth Circuit in this case under the provisions of Sec. 240(a) of the Judicial Code as amended (28 U. S. C., Sec. 347(a) ); under Sees. 10(e) and (f) of the National Labor Relations Act, as amended (Act of July 5, 1935, Ch. 372, Sec. 10; 49 Stat. 453; 29 U. S. C., Sec. 160); and under General Rule 38, Sec. 5, Subd. (b), of this Court.

(b) The Statute of the United States involved in this proceeding is the Act of Congress known as the National Labor Relations Act (Act of July 5, 1935; 49 Stat. 449, Ch. 372; 29 U. S. C., Sec. 151, et seq.), the pertinent provisions of which are set forth in the Appendix to the Brief annexed hereto.

(c) The Decree of the Circuit Court of Appeals for the Eighth Circuit, now sought to be reviewed, was entered by the said Court on June 23, 1944 (R3-12). Such Decree was final in form and effect. The Petitioner thereafter filed a Motion to Stay the Issuance of a Certified Copy of the Decree (R3-14), upon which an Order was

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<sup>9</sup>The departments never were, in fact, closed and the finding is, therefore, wholly conjectural—not meeting, we submit, the burden of proof resting upon the Board. Reed on Law of Labor Relations, Sec. 1, p. 37.

entered staying the issuance thereof for a period of 30 days from July 18, 1944, if Certiorari was sought, and thereafter, until the final disposition of the case by the decision of the Supreme Court (R3-16).

### C. QUESTIONS PRESENTED

The principal question presented is:

(1) Whether or not the Petitioner, in operating a local retail department store wholly within the confines of a State is, nevertheless, legally susceptible to the provisions of the National Labor Relations Act, as being in interstate commerce or substantially affecting interstate commerce, so as to come under the National Labor Relations Board's power to "prevent any person from engaging in any Unfair Labor Practice affecting commerce" as provided in Sec. 10 of such Act.

Ancillary to such main question are the further questions:

(2) From the standpoint of the incoming stock of merchandise and, foremost, because alone considered by the decision below to furnish a basis for a finding of a possible interruption or stoppage of interstate commerce—whether the wholly local character of such merchandising activity, represented by sales over the counter, is varied by the stocking of shelves of the Store through purchases outside of the State.

(3) From the standpoint of the outgoing sales by the Store—

(a) Whether occasional sales not over the counter on the Store premises (as by mail order)—in no event exceeding 1% of the Store's entire business—are sufficient to metamorphose a wholly intrastate activity into

an interstate activity, so as to render the Petitioner subject to the National Labor Relations Act.

(b) Whether trivial or minute percentages of such sales as, for instance, with respect to deliveries outside of the State by non-Store facilities (completing sales made upon the Store premises), are, nevertheless, to be considered as of sufficient influence to bring the Petitioner within the purview of the Act.

(c) Whether advertising in newspapers, with a minor circulation in other States—although soliciting only local or intrastate sales over the counter at the Store premises—renders the Petitioner subject to the Act.

(d) Whether sales on credit to out-of-state customers, in a very minor amount—made, however, on the Store premises—render the Petitioner subject to the Act.

(4) From the standpoint of the Respondent Board meeting the burden of proof cast upon it, that a Labor dispute in the Petitioner's Store, particularly in the two minor and non-essential alteration departments therein, would burden or obstruct interstate commerce or the free flow of interstate commerce, as alleged by the Board—whether the stoppage or suspension of such two alteration departments would have a direct and substantial effect on interstate commerce.

In deciding the foregoing questions adversely to the Petitioner, the Court below, it is submitted, committed error as to each and all of the afore-delineated questions. The Petitioner, therefore, designates such adverse rulings as specifications of error to be urged upon this Court.

## **D. REASONS RELIED ON FOR THE ALLOWANCE OF WRIT OF CERTIORARI**

Without elaboration thereof herein,<sup>10</sup> the Petitioner submits the following as reasons which should impel the allowance of the Writ of Certiorari herein prayed.

### **I.**

#### **The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Holdings of Other Circuit Courts of Appeals on the Same Matter**

The decision below, in holding jurisdiction under the Act to attach to the Petitioner's Store in this instance, as a local merchant—even though part of the merchant's stock in trade originated outside of the State—is at odds with the holding by the Circuit Court of Appeals for the Second Circuit in—

*Consolidated Edison Co. v. National Labor Relations  
Board* (C. C. A. 2), 95 Fed. (2) 390, 393; aff'd,  
305 U. S. 197, 83 L. Ed. 126.

The decision below is, likewise, in conflict with a decision of the Circuit Court of Appeals for the Fourth Circuit in—

*National Labor Relations Board v. White Swan Com-  
pany* (C. C. A. 4), 118 Fed. (2d) 1002,

in holding that interstate purchases for the shelves of an otherwise purely local or intrastate business furnish a jurisdictional base for the application of the Act. See also *Schroepfer v. A. S. Abell* (C. C. A. 4), 138 Fed. (2d) 111.

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<sup>10</sup>See the Brief, annexed hereto, containing a more particular exposition.

## II.

**The Circuit Court of Appeals Has Decided an Important  
Question of Federal Law Which Has Not Been,  
but Should Be, Settled by This Honorable Court**

This Honorable Court has heretofore settled, in several cases, the matter of jurisdiction under the National Labor Relations Act as to its application to manufacturing, canning, publishing, generating and other like industrial enterprises—all devoted to production. This case, however, presents, for the first time, another major phase of business activities not heretofore passed upon by this Court, namely, trading in merchandise, or retail selling—as encompassing, generally, local distribution.

This merchandising field of endeavor is so far a thing apart from production or manufacture, and so distinct a phase of national and local economy, that we submit that it warrants separate and decisive treatment. Even the Respondent Board itself, for eight years after passage of the National Labor Relations Act, did not invade this new field. The question of jurisdiction over merchants—particularly local retail merchants—should, therefore, be decided at the threshold, in order to settle the Law of Labor Relations in this vast segment of the Nation's business.

## III.

**The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Honorable Court**

The decision below collides with the philosophy and trend of many prior decisions by this Court.

(a) Thus, on the one hand, it has ignored the initial observation by this Court that the National Labor Relations Act is not applicable to a "host of local enterprises throughout the country" where "there may be but indirect and remote effects upon interstate commerce."

*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30, 81 L. Ed. 893, 914.

That landmark case limited its decision of coverage under the Act to those enterprises "making their relation to interstate commerce the *dominant* factor in their activities."

(b) The decision below, likewise, has overlooked that the Act has been held not to extend to all employers and all employees.

*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30, 81 L. Ed. 893, 907, 908, 911.

*Washington, Virginia & Maryland Coach Company v. National Labor Relations Board*, 301 U. S. 142, 146, 81 L. Ed. 965, 969.

(c) The decision below has, likewise, failed to observe the caution, expressed by this Court, to preserve the distinction between what is national and what is local

in the activities of commerce, as vital to the maintenance of our Federal system.

*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30, 81 L. Ed. 893, 907, 908, 911.

*New York ex rel. Pennsylvania Railroad Company v. Knight*, 192 U. S. 21, 48 L. Ed. 325.

*Parker v. Brown*, 317 U. S. 341, 362, 87 L. Ed. 315, 332.

*Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U. S. 453, 460, 82 L. Ed. 954, 957.

*Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638.

(d) The decision below has failed to note the requirement of this Court that the effect on Interstate Commerce of activities, which, separately considered, are local or intrastate, must be direct, immediate and substantial, as a prerequisite to jurisdiction under the Act.

*Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U. S. 453, 466, 82 L. Ed. 954, 960.

*Anderson v. United States*, 171 U. S. 604, 54 L. Ed. 300.

*National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 83 L. Ed. 1015.

*U. S. v. Wrightwood Dairy Company*, 315 U. S. 110, 86 L. Ed. 726.

35 Mich. Law Rev. 1286, 1294 on "Businesses Subject to the National Labor Relations Act."

(e) From another standpoint—the decision below has failed to recognize the traditional and time-honored

distinction, removing from Federal control "myriads of local businesses," as to matters "traditionally left to local custom or local law."

*Federal Trade Commission v. Bunte Brothers, Inc.*,  
312 U. S. 349, 355, 85 L. Ed. 881, 885.

(f) In still another respect, the decision below has failed to note observations, in recent wholesale cases, by this Court of the undeniably intrastate character of "goods acquired and held by a local merchant for local disposition."

*Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570,  
87 L. Ed. 460, 467.

*McLeod v. Threlkeld*, 319 U. S. 491, 494, 87 L. Ed.  
1538, 1541.

*Higgins v. Carr Brothers Company*, 317 U. S. 572,  
574, 87 L. Ed. 468, 471.

*American Steel & Wire Company v. Speed*, 192 U. S.  
500, 48 L. Ed. 538.

(g) The decision below, also, has failed to follow the decisions of this Court, which mark the cessation of Interstate Commerce when goods have come to rest, subject to local distribution, after passage from another state.

*Bowman v. Continental Company*, 265 U. S. 642, 65  
L. Ed. 1139.

*Higgins v. Carr Brothers Company*, 317 U. S. 572,  
87 L. Ed. 468.

*Best & Company v. Maxwell*, 311 U. S. 454, 85 L. Ed.  
275.

(h) The decision below, also, has failed to follow the decisions of this Court under Federal Acts, with a like jurisdictional standard or base, labeling local activ-

ities as having only an indirect or remote effect upon Interstate Commerce.

*A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 79 L. Ed. 1570.

(i) On the other hand, the decision below particularly offends, in ascribing a jurisdictional base to the fact of purchases, originating in other States, for the stocking of the shelves of the local merchant, inasmuch as local selling by the merchant, and the consequent intrastate character of such business, are not altered by the importations of stock from other States, according to numerous decisions of this Court.

*Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290.

*A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 79 L. Ed. 1570.

*Walling v. Jacksonville Paper Company*, 317 U. S. 564, 571, 87 L. Ed. 460, 468.

*Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 220, 83 L. Ed. 126, 135.

*Rast v. Van Deman & Lewis Company*, 240 U. S. 342, 60 L. Ed. 679.

*Wagner v. Covington*, 251 U. S. 95, 64 L. Ed. 157.

*Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 64 L. Ed. 649.

*Southern Natural Gas Corporation v. Alabama*, 301 U. S. 148, 81 L. Ed. 970.

*Moore v. New York Cotton Exchange*, 270 U. S. 604, 70 L. Ed. 754.

*Rosenberg Brothers & Co. v. Curtis Brown Co.*, 260 U. S. 516, 67 L. Ed. 372.

(j) The decision below has failed properly to apply the "de minimis" doctrine, as prescribed by this Court in a case under the Act, to the approximately 1% of occasional or incidental sales delivered by mail or other non-Store facilities into other States.

*National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 307 U. S. 609, 83 L. Ed. 1014.

(k) The decision below has over-ascribed importance to incidental advertising in newspapers, having circulation in two States (soliciting, however, only local sales), contrary to a decision of this Court.

*Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 64 L. Ed. 649.

(l) The decision below has, likewise, not taken into consideration the holdings of this Court which judicially recognize the absence of a burden on Interstate Commerce of a Labor Dispute, to any appreciable extent, even though local business has been seriously disrupted thereby.

*Industrial Association of San Francisco v. United States*, 268 U. S. 64, 69 L. Ed. 849.

*United Mine Workers v. Coronado Coal Company*, 259 U. S. 344, 410, 66 L. Ed. 975.

*United Leather Workers v. Herkert & Meisel Trunk Company*, 265 U. S. 457, 68 L. Ed. 1104.

35 Mich. Law Rev. 1286, 1294, 1295, on "Businesses Subject to the National Labor Relations Act."

## IV.

**The Questions Presented Herein Are of Great Public Importance**

Because the issue presented to this Honorable Court is of first impression therein, and because the settlement of such issue concerns the labor relations of the entire retail field in the country—numbering thousands of stores, as afore indicated—the questions presented hereby are of paramount importance to a very large segment of the business interests of the country.

Until the application of the Wagner Act to this field is authoritatively, and by a final decision, settled, unnecessary confusion will obtain. An economy of time and effort will result, and an abundance of harmony of viewpoint will prevail, if this Court accepts for review and final decision the questions posed by this case.

The need of an authoritative and elucidating decision by the business world, as well as by the legal profession, on a topic which affects “myriads of local businesses” as to matters heretofore “traditionally left to local custom or local law” (to borrow from *Federal Trade Commission v. Bunte Brothers, Inc.*, supra), does not require demonstration,<sup>11</sup> as transfer to Federal procedures of the Labor Relations of even some of the stores in the country is in itself imposing.

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<sup>11</sup>The Store of the Petitioner, from the standpoint of size, is itself far down the scale. See Census and Relative Position of Department Stores in Stipulation of Parties (R1-40 to 42).

**E. RECORD TRANSMITTED HERewith**

Your Petitioner presents to this Court, and files herewith, as an exhibit hereto, a duly certified transcript of the entire record in the case entitled *J. L. Brandeis & Sons, a Nebraska Corporation, Petitioner, v. National Labor Relations Board, Respondent*, and numbered on its docket No. 12,782, as the same appears in the United States Circuit Court of Appeals for the Eighth Circuit.

WHEREFORE, your Petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue, under the seal of this Court, a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit (a certified full and complete Transcript of the Record of the proceedings in this cause being submitted herewith), to the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law; that the judgment and decree of the Circuit Court of Appeals may be reversed; and that your Petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated at Omaha, Nebraska, August 12, 1944.

J. L. BRANDEIS & SONS.

By J. A. C. KENNEDY,

GEORGE L. DELACY,

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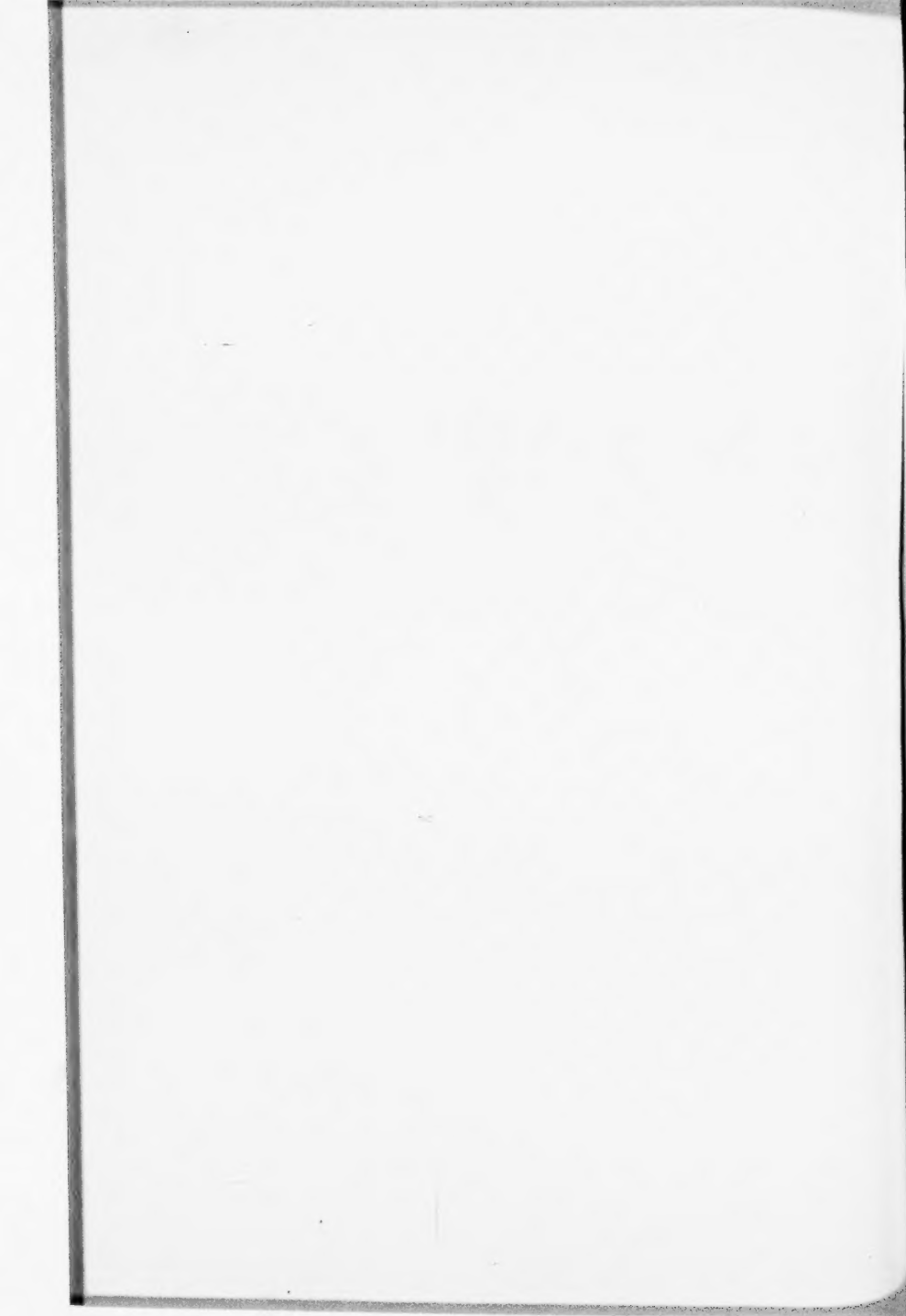
LAWRENCE J. TIERNEY, and

HARRY R. HENATSCH,

City National Bank Building,  
Omaha, Nebraska,

*Of Counsel.*





IN THE  
**Supreme Court of the United States**

— o — o —

October Term, 1943

— o — o —

**No.** \_\_\_\_\_

— o — o —

J. L. BRANDEIS & SONS,  
*Petitioner,*  
vs.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

— o — o —

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI**

— o — o —

*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

As supporting the foregoing Petition for Certiorari,  
and demonstrating that probable cause for a full con-  
sideration of the case, in ordinary course, obtains—con-  
sidering the entire environment of the case—the following  
Brief is respectfully submitted:

## **OPINION OF THE COURT BELOW**

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R2-6) is reported in 142 Fed. (2d) 972 (adv. sheets).

For ready reference, the opinion of the Board, in the Complaint case, from which the court action arose, appearing in the record as the Decision and Order of the Board (R1-67), will be found in 53 N. L. R. B. 352.

## **BASIS OF JURISDICTION**

Jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended (28 U. S. C. Sec. 347(a); under Sec. 10(e) and (f) of the National Labor Relations Act, as amended (Act of July 5, 1935, Ch. 372, Sec. 10; 49 Stat. 453; 29 U. S. C. Sec. 160); and under General Rule 38, Sec. 5, Subd. (b) of this Court.

The opinion of the Circuit Court of Appeals was filed June 7, 1944 (R3-4) and the Decree of the Circuit Court of Appeals, entered pursuant thereto, was entered June 23, 1944 (R1-12). An Order, staying issuance of a Certified Copy of the Decree to the Board, was thereafter entered on July 18, 1944 (R3-16).

## **STATUTE INVOLVED**

The statute involved is the National Labor Relations Act (49 Stat. 449, Ch. 372, 29 U. S. C. Sec. 151, et seq). Certain sections of such Act, which are involved herein, are set forth in the Appendix to this Brief.

## STATEMENT OF THE CASE

The Statement of the Case, pertinent to the Reasons relied upon for the granting of the Writ of Certiorari, as prayed herein, is contained in the foregoing Petition and will not here be enlarged.

It might supply clarity, however, if such Statement in the Petition were supplemented by a further thumbnail sketch of how the supposed "interstate" aspects of the Store, as to its sales, were ascertained.

Manifestly, a retail department store—issuing no catalogues, soliciting no mail order business, selling no national concerns, employing no federal trade-marks, doing no national advertising, doing no wholesaling, and so forth—transacts all its business over its counters on the store's premises and, therefore, is engaged in a purely local activity. Its customers come to it at the Store, and are, in large part, unidentified because most of the sales are cash sales. For instance, because of Omaha being on a state border, the Store has many Council Bluffs, Iowa, customers, who migrate daily to Omaha and trade over the counters of the Store, but such sales are, like others, local sales.<sup>12</sup>

Consequently the only index of supposedly "interstate" sales were through (a) out-of-state credit accounts, (b) occasional mail orders, or, more properly, mail department transactions, where customers were elsewhere on vacation, sent gifts to friends or relatives in other states, or supplied their children away at school in other states, and (c) deliveries by other than store facilities—the store delivering merchandise to customers only within

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<sup>12</sup>*United States v. Sutherland* (D. C., Mo.), 9 F. Supp. 904, stating "It is impossible to elaborate a truth so simple" of a like transaction with an out-of-state customer buying at the premises.

the state and maintaining no out-of-state delivery facilities whatsoever.

The significant thing about these three categories is that, in the first place, there were no solicitations of interstate sales; in the second place, such transactions were wholly casual, occasional and incidental; and, lastly, even in such cases, the sale transaction took place on the store premises, that is, over the counters (as in the case of other sales) in large part.

However, on an analysis of such very minor departures from the usual sales over the counters, with delivery on the premises or by store facilities within the state, the following developed:

a) The packages mailed out of the state (mail orders or delivery by mail facilities) were only .0024% of total sales (Co.'s Exh. 6C, R2 (a)-513, and see R2-46, 47, 65, and 253 to 255).

b) On sales to out-of-state credit customers, less than 1.1% of the total sales were not completed (including delivery) on the store premises,—this because only 2.2% of total sales were with out-of-state credit customers, and 66% of such custom, and, therefore, in this class, 1.45% of total sales, were, nevertheless, local sales, transacted and completed on the store premises (Co.'s Exh. 5C, R2 (a)-512, and see R2-44 to 47, 50 to 52, 74, 252, and 260 to 263).

c) From a delivery of packages (other than by mail) standpoint, 3.7% of total deliveries, but only 8/10 of 1% in total sales, were by independent out-of-state, express facilities (Co.'s Exh. 6½C, R2 (a)-513, and see R2-25, 40, 48-49, 102, and 256 to 260).

These three categories are not to be aggregated, as they represent different approaches and, consequently, overlap.

The net result is that the Board, in discharging the burden cast upon it of showing that the business of the Petitioner was other than a purely local and intrastate activity, was not able to demonstrate that more than 1% of the total sales of the Store were actually non-local or not transacted over the Store's counters and, therefore, as having to some extent an "interstate" character (but in the sense only that one or another phase of the completed sales transaction was not completed on the Store's premises).

The foregoing analysis is supplied, in order to demonstrate the infinitesimal character of the alleged "interstate" business of the Store upon which (from the standpoint of sales) it was sought to attach Wagner Act coverage to the Petitioner.

### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that a local retail department store, conducting over-the-counter sales wholly within the confines of a state, is, nevertheless, subject to the provisions of the National Labor Relations Act, either as being in Interstate Commerce or as substantially affecting Interstate Commerce.

2. In holding that the wholly local character of such merchandising activity, comprising sales over-the-counter, is altered by the stocking of the shelves of the store, through purchases of stock or merchandise originating outside of the state.

3. In holding that casual, occasional or incidental sales, not aggregating over 1% of the Store's entire volume, completed in some phase of the sale outside of the

state (as by delivery by mail or other non-store transportation facilities), nevertheless, render such local retail department store subject to the Act.

4. In holding that a minimal quantity of sales to out-of-state customers (on credit, but made on the store premises); advertisements in newspapers with a minor circulation in other states (but soliciting only local sales over-the-counter on the store premises); delivery outside of the state by non-store facilities, completing sales made upon the premises—all in an amount not aggregating over 1% of the Store's entire sales volume—are valid considerations, altering the local or intrastate character of the Store.

5. In holding that the Record contains proof that a non-existent, but possible, Labor Dispute in the Petitioner's Store, particularly in two minor and non-essential alteration departments, involved in the case, would substantially burden or obstruct Interstate Commerce or the free flow of Interstate Commerce, if the operation of such Store or alteration departments were stopped or suspended and, therefore, that the interruption of the continuity of such Store or departments would have a direct, immediate and substantial effect on Interstate Commerce.

#### **ARGUMENT IN SUPPORT OF ACCEPTANCE OF JURISDICTION BY THIS COURT BY GRANT OF CERTIORARI**

We conceive it to be the function of this supporting Brief merely to demonstrate probable cause for the grant of Certiorari. We, therefore, abstain from an argument upon the merits, or from a citation of authorities of courts other than this Court, except insofar as is neces-

sary to demonstrate conflict of the decision under review with decisions or holdings of other Circuit Courts of Appeals.

**I. The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Holdings of Other Circuit Courts of Appeals on the Same Matter.**

To show the disparity between the decision of the Circuit Court of Appeals for the Eighth Circuit in the instant case—particularly in the main or principal test applied by the lower Court, to-wit, the influence of purchases of merchandise for local retail selling activities originating outside of the state—and the holdings on the same topic in other Circuits, we call attention to the following as demonstrating an irreconcilable conflict.

Thus, the Circuit Court of Appeals of the Second Circuit has stated of a local merchant in *Consolidated Edison Company v. National Labor Relations Board*:<sup>13</sup>

“Consistently with these principles it can scarcely be doubted that *the labor disputes of a local merchant will not normally fall within the Board’s jurisdiction, even though some part of his stock in trade originates outside the state or some of his local customers are engaged in interstate commerce.* In such a case the closing of the merchant’s store by a strike of his employees would undoubtedly affect interstate commerce, but *the effects would be too remote and indirect to bring his activities within the range of federal regulation.* \* \* \*” (Emphasis supplied.)

This is directly antipodal to the decision under scrutiny.

So in the Fourth Circuit, in the case of *National Labor Relations Board v. White Swan Company*,<sup>14</sup> the

<sup>13</sup>(C. C. A. 2) 95 Fed. (2d) 390, 393, aff’d 305 U. S. 197, 83 L. ed. 126.

White Swan Company operated a combined laundry and dry cleaning establishment in the City of Wheeling, West Virginia. In the opinion, that Court states:

“While certain of its supplies are obtained from without the state, the volume of the interstate business thus involved is not sufficient, in our opinion, to bring the business within the jurisdiction of the Board. The record shows that these supplies consist of soap, bluing, bleach, solvent, coal, water, paper, tape and padding, and that respondent's purchases thereof during 1938 amounted to \$38,333.15, of which \$10,810.90 came from without the state. Respondent, however, operates delivery trucks in Ohio as well as in West Virginia, three of the delivery routes from its plants being in Ohio and eleven in West Virginia. The business involved is necessarily of a purely local character, as the record shows that a radius of fifteen miles is the practical limit for a laundry or dry cleaning business in this territory. The fact that business is done in Ohio, outside the state in which respondent's laundry is located, results from the fact that this purely local business is located in a city on a state line. Respondent transports garments in its trucks from those of its customers who reside in Ohio to its plant in West Virginia to be serviced, and then after servicing returns the garments in its trucks to the customers.”

The Court was in doubt and therefore certified the questions of law to the Supreme Court of the United States.<sup>15</sup> The Supreme Court held that the questions were defective because they did not reflect the precise conclusions of the Board and the precise findings on which those conclusions were based. That Circuit Court then further stated:

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<sup>14</sup>(C. C. A. 4) 118 Fed. (2d) 1002.

<sup>15</sup>313 U. S. 23, 85, L. ed. 1164.

"A motion has been made by the Solicitor General that this Court amend the certificate heretofore made to the Supreme Court of the United States by certifying to that Court a question which would embody the purchase by respondent of a portion of its supplies in interstate commerce as well as the fact that it derives a substantial portion of its income from business which involves collections and deliveries in interstate commerce. *We are clearly of the opinion, however, as stated in our certificate, that the volume of interstate business involved in the purchase of supplies is not sufficient to bring the business of respondent within the jurisdiction of the Board.* And if it be held that the fact that respondent derives a substantial portion of its income from business which involves collections and deliveries in a state other than that in which the business is located does not confer jurisdiction on the Board under the Act, we are of opinion that the Board was without jurisdiction." (Emphasis supplied.)

The Court, in its certificate, further said:

"If the business of collecting and delivering articles in the manner stated in the questions brings the business of respondent within the Board's jurisdiction, the purchase of supplies does not increase jurisdiction; *if it does not, such purchase, in our opinion does not confer jurisdiction.*" (Emphasis supplied.)

That Court, therefore, categorically rejected out-of-state purchases as a jurisdictional base.

It is of interest, too, that the Circuit Court of Appeals for the Fourth Circuit made an observation at a more recent date, consistent with its foregoing decision, in *Schroepfer v. A. S. Abell*,<sup>16</sup> as follows:

"A sausage manufacturer who sells his product intrastate would hardly be said to be engaged in interstate commerce with respect to such intrastate

<sup>16</sup>(C. C. A. 4) 138 Fed. (2d) 111.

*sales merely because he purchases the materials that go into the sausages in interstate commerce.*

"The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce." (Emphasis supplied.)

### **Conflict With Other Decisions on the Non-Influence of Out-of-State Stock Purchases**

The conflict here indicated could be extended to other Circuits, as exemplified by final decisions therein, likewise refuting the influence of out-of-state purchases upon an otherwise local or intrastate business—particularly, one devoted to sales or distribution.

Thus in the Fifth Circuit, in *Jax Beer Co. v. Redfern*,<sup>17</sup> it was held that the local sale and distribution of beer is intrastate commerce, even though such beer was received from without the state and stored in a warehouse.

In *The Prescription House, Inc., v. Anderson*,<sup>18</sup> it was held that employees of a drug store were in intrastate commerce, notwithstanding the fact that the store purchased part of its stock of drugs and merchandise from outside of the State, and notwithstanding the further fact that such articles and drugs were shipped and transported to the Store in interstate commerce, as such transactions were merely incidental to the business of filling prescriptions and selling articles used in the sick room.

Numerous other cases support the same view.<sup>19</sup>

<sup>17</sup>(C. C. A. 5) 124 Fed. (2d) 172.

<sup>18</sup>(D. C., Tex.) 42 F. Supp. 874.

<sup>19</sup>*Kansas City Structural Steel Company v. Arkansas*, 269 U. S. 148, 152, 70 L. ed. 204, 206; *Duncan v. Montgomery Ward & Company, Inc.* (D. C., Tex.), 42 F. Supp. 879; *Winslow v. Federal Trade Commission* (C. C. A. 4), 277 Fed. 206; cert. den. 258 U. S. 618, 66 L. ed. 793; *U. S. v. Superior Products* (D. C., Idaho), 9 F. Supp. 943; *U. S. v. Sutherland* (D. C., Mo.), 9 F. Supp. 204; *Gerdert v. Certified Poultry*

**Conflict With Other Decisions on Retail or Distribution Businesses as Not Being in, or Affecting, Interstate Commerce**

A like conflict of the decision below with decisions in several other Circuits is demonstrated from the standpoint of characterization of a local sales or distribution business as being in, or affecting, Interstate Commerce.

Thus in the Sixth Circuit in *Allesandro v. C. F. Smith Company*,<sup>20</sup> the action involved a chain of grocery stores within the State of Michigan. It was held that such business was not engaged in interstate commerce, the Court saying in the opinion:

"The sole business of the Smith Company is retailing and its warehousing of merchandise without other purpose than to provide for necessary and economical distribution of merchandise to its stores for sale at retail.

"\* \* \* The Smith business is a retail business, its goods are acquired by a local merchant for local disposition and differ not at all from those of the corner grocery except in volume and perhaps in selling price."

See, also, to like effect from the Ninth Circuit with respect to a chain retail shoe store operation, *Walling v. Block*.<sup>21</sup>

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& Egg Company (D. C., Fla.), 38 F. Supp. 964; *Midland Oil Company v. Sinclair Refining Company* (D. C., Ill.), 41 F. Supp. 436; *Klotz v. Ippolito* (D. C., Tex.), 40 F. Supp. 422; *Moses v. McKesson & Robbins* (D. C., Tex.), 43 F. Supp. 528; *Walling v. Silver Bros. Company* (C. C. A. 1), 136 Fed. (2d) 168. Strangely, *Schwarz v. Witwer Grocery Co.* (C. C. A. 8), 141 Fed. (2d) 341, Syl. 5, and *Walling v. Mutual Wholesale Food & Supply Co.* (C. C. A. 8), 141 Fed. (2d) 331, Syl. 16, repel the principle that goods bought interstate for resale intrastate give an interstate commerce character.

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<sup>20</sup>(C. C. A. 6) 136 Fed. (2d) 75.

<sup>21</sup>(C. C. A. 9) 139 Fed. (2d) 269.

In *Pittsburgh Plate Glass Company v. Jarrett*<sup>22</sup> the action was under the Clayton Act, as amended by the Robinson-Patman Act, and it was there held that sales by a local branch store of a glass company to the general trade in the city, where the store was located, were not made in "interstate commerce." Also, under the Robinson-Patman Act, it was held in *Midland Oil Company v. Sinclair Refining Company*<sup>23</sup> that a distributor of gasoline within Chicago was not engaged in "interstate commerce," although purchasing gasoline from another corporation within the State, which, in turn, purchased from a refiner engaged in interstate commerce.

In *U. S. v. French*<sup>24</sup> the Court held interstate commerce was not affected under the National Industrial Recovery Act by a retail coal dealer's business, or to quote the second paragraph of the Syllabus:

"Interstate commerce held not involved or affected, directly or indirectly, by village retail coal dealer's business of purchasing coal, shipped from mines in other states in carload lots, and selling it to consumers within radius of few miles from village for domestic purposes, without further transportation thereof, except by purchasers to places of final consumption, so that National Industrial Recovery Act is inapplicable to such business; shipments being subject to regulation only as intrastate commerce after coming to rest at such village (National Industrial Recovery Act, 48 Stat. 195)."

In the opinion the Court said:

"The court can discover no causal connection, direct or indirect, between interstate commerce and hours of labor and wage scales in a retail business

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<sup>22</sup>(D. C., Ga.) 42 F. Supp. 723.

<sup>23</sup>(D. C., Ill.) 41 F. Supp. 436.

<sup>24</sup>(D. C., Mich.) 10 F. Supp. 674.

conducted in a rural community in which the annual sales of coal approximate 2,500 tons. *No proof appears here which will warrant the conclusion that interstate commerce is in any manner affected.* The relationship contended for is either infinitesimal or entirely illusory. Were such remote transactions as those in question to become subjects of federal regulation under the commerce clause of the Constitution, the reserved power of the states would become largely ineffectual." (Emphasis supplied.)

In *Collins v. Kidd*<sup>25</sup> the business was a retail ice plant located in a border town between Texas and Arkansas, but 75% to 90% of the sales were made in the place of location. It was sought to hold the business subject to the Fair Labor Standards Act as being in interstate commerce, because some of the products were sold in that part of the border town which was located in Arkansas. The Court held to the contrary, stating:

"\* \* \* It is clear, under the facts, that the defendants Kidd and others, living in a border line town between two states, were selling some of their products in that portion of the city across the state line. We do not think that this comes within the purview of interstate commerce contemplated by the Constitution of the United States. To do so would make every retail dealer in every border line town subject to the national rules governing interstate commerce, which was manifestly not the purpose of the Constitution or the intent of any statutory enactment upon such subject. \* \* \*

In *Boro Hall Corporation v. General Motors Corporation*,<sup>26</sup> the action was under the Sherman Anti-Trust Act, and the business involved was that of servicing and selling supplies for automobiles. The facts are more fully set

<sup>25</sup>(D. C., Tex.) 38 F. Supp. 634.

<sup>26</sup>(C. C. A. 2) 124 Fed. (2d) 822.

out in the lower Court's decision.<sup>27</sup> As in the lower Court, the upper Court held that the business did not affect interstate commerce, the Circuit Court of Appeals saying:

"\* \* \* The second cause of action is based on an alleged restriction of the trade of 'the plaintiff and others in the business of servicing and selling supplies for automobiles.' *These acts were plainly intra-state and did not affect interstate commerce.* The second cause of action was therefore rightly dismissed. There is no allegation or proof that there was an interference or restriction of interstate commerce. \* \* \*" (Emphasis supplied.)

In *Walling v. Goldblatt Bros., Inc.*,<sup>28</sup> in a case involving a chain of department stores and three warehouses, operating in two states, the following observations of the Court are of interest on the interstate commerce aspects of the business:

"Here, once the goods reached the warehouses, they assumed a wholly local character. The function of the warehouses was to furnish activities and means for the conduct of a relatively local retail business conducted by one company. This function was that of an ordinary warehouse for a retail establishment and bears no resemblance to a 'throat' or a 'current of commerce.' Upon delivery to the warehouse, interstate commerce ceased. *Schechter Corp. v. United States*, 295 U. S. 495; *Gerdert v. Certified Poultry & Egg Co.*, 38 F. Supp. 964; *Winslow v. Federal Trade Commission*, 277 Fed. 206, 209 (C. C. A. 4), cert. denied 258 U. S. 618; *Atlantic C. L. R. R. v. Standard Oil Co.*, 275 U. S. 257, 267.

"Where orders are solicited within a state and the goods are shipped from without the state directly

<sup>27</sup>(D. C., N. Y.) 37 F. Supp. 999.

<sup>28</sup>(C. C. A. 7) 128 Fed. (2d) 778, cert. den. 318 U. S. 757, 87 L. ed. 1130.

to the customer or to an agent for delivery to the customer the transactions are a part of interstate commerce until the goods reach the customer. *Jewel Tea Co. v. Williams*, 118 F. (2d) 202, 206 (C. C. A. 10), and cases there cited; *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291; *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52. But here there were no such prior orders. \* \* \*

The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce. *Jewel Tea Co. v. Williams*, 118 F. (2d) 202, 207 (C. C. A. 10), and cases there cited; *Lipson v. Socony Vacuum*, 87 F. (2d) 265, 267 (C. C. A. 5). Where goods are delivered to the buyer to be sold later and delivered to intrastate buyers subsequent acts are not commerce. *Jax Beer Co. v. Redfern*, 124 F. (2d) 172, 174 (C. C. A. 5); *Swift & Co. v. Wilkerson*, 124 F. (2d) 176 (C. C. A. 5); *Jewel Tea Co. v. Williams*, 118 F. (2d) 202 (C. C. A. 10); *Gerdert v. Certified Poultry & Egg Co.*, 38 F. Supp. 964; *Veazey Drug Co. v. Fleming*, 42 F. Supp. 689; *Klotz v. Ippolito*, 40 F. Supp. 422; *Foster v. National Biscuit Co.*, 31 F. Supp. 552; *Lipson v. Socony Vacuum*, 87 F. (2d) 265 (C. C. A. 3); *Atlantic Coastline R. R. v. Standard Oil*, 275 U. S. 257; *Winslow v. Federal Trade Commission*, 277 Fed. 206; *Fleming v. Arsenal Bldg. Co.*, 38 F. Supp. 207; *Rauhoff v. Gramling & Co.*, 42 F. Supp. 754."

In *Jewel Tea Co. v. Williams*,<sup>29</sup> several salesmen brought an action against the Jewel Tea Company for overtime compensation and liquidated damages under the Fair Labor Standards Act. The duties of plaintiffs consisted of selling and distributing the Company's product at retail to customers in their homes. All of the salesmen worked exclusively within the State of Oklahoma.

In the opinion the Court states:

<sup>29</sup>(C. C. A. 10) 118 Fed. (2d) 202.

“Where orders are solicited within a state and the goods are shipped from without the state directly to the customer or to the agent for delivery to the customers in fulfillment of specific orders, the transactions are held to be interstate commerce. But the facts in the instant case distinguish it from those cases. Here, the orders for merchandise forwarded by the branch manager to Barrington were not predicated on salesmen’s orders on hand, but were based solely on the stock on hand and prior depletions thereof, and were made with a view to replacement of stock depletions and to fill anticipated demand or future orders. Sufficient stock was always on hand to fill the orders of salesmen at the time they were obtained and orders were always filled out of stock on hand and not from new stock received after the orders were obtained. The old stock moved out first and the new stock simply replaced it. Goods shipped from Barrington to the branch in Tulsa came to rest in Oklahoma and became commingled with the mass of goods already within the state, and they were there held solely for local distribution and use so far as the activities of the employees were concerned.

“Where goods are ordered and shipped in interstate commerce to meet the anticipated demands of customers without a specific order from the customer, and the goods come to rest in a warehouse, the interstate commerce ceases when the goods come to rest in the state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer.

“The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce. (Citing *Schechter Poultry Corporation v. United States*, 295 U. S. 495, 543, 55 S. Ct. 837, 849, 97 L. Ed. 1570, 97 A. L. R. 947.)

In *Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, Inc.*,<sup>30</sup> the plaintiff brought an action under the provisions of the Federal Anti-Trust Law, charging monopolistic practices and price-fixing, detrimental to plaintiff. Many of the commodities sold by plaintiff were alleged to be national food brands, shipped in interstate commerce to the plaintiff. The defendants were a non-profit organization and trade association, and various wholesalers.

In the opinion the Court states:

"The Court is of the view that, leaving aside the question whether the practices of the defendants with regard to maintenance of prices, would be legal or illegal, reasonable or unreasonable, if interstate commerce were involved, the acts complained of *do not affect directly interstate commerce* and do not constitute a restraint of it.

"The plaintiff is a California corporation, engaged solely in the business of selling and distributing food, groceries and allied articles of merchandise at retail in various retail stores owned and maintained by it in the cities of Los Angeles, Long Beach, Lynwood and Compton, all in the County of Los Angeles, California.

"Assuming that some of the products on its shelves are imported from other states, the moment they reach its shelves, they come to rest and cease to be 'in the flow' of interstate commerce. *Schechter Poultry Corp. v. United States*, 1935, 295 U. S. 495, 55 S. Ct. 837, 97 L. Ed. 1570, 97 A. L. R. 947; *Southern Pac. Co. v. Gallagher*, 1938, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586.

"As they are not subject to regulation by the Congress in that condition, they are not within the contemplation of the Sherman Anti-Trust law, 15

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<sup>30</sup>(D. C., Cal.) 33 F. Supp. 539.

U. S. C. A. Secs. 107, 15 note, or any other anti-trust statute aiming to prohibit certain practices in interstate commerce.

"The activities of the defendants, complained of by the plaintiff, are limited to merchandise of the plaintiff *after it comes to rest*. They are not even state-wide, but are limited to six northern counties of California." (Emphasis supplied.)

In *Lipson v. Socony Vacuum Corporation*,<sup>31</sup> the plaintiff brought an action at law to recover treble damages under the Clayton Act. Defendant company distributed gasoline from local storage tanks in Massachusetts to consumers, in tank trucks at tank car prices. Defendant company shipped gasoline into the state to supply long term contracts and authorized dealers, selling on a commission basis, and to supply exclusive retailers on a tank car market. The Court holds that distribution from the defendant's local storage tanks, direct to the consumer, in tank trucks, at tank car prices, is intrastate commerce.

If it be said that some of the foregoing characterizations of retail activities were influenced by the narrower jurisdiction obtaining under the Fair Labor Standards Act, the answer is that such narrower jurisdiction did not permeate the decisions rendered under the National Industrial Recovery Act, the Sherman Anti-Trust Act, the Clayton Act or The Robinson-Patman Act. Furthermore, as stated in an article on "Businesses Subject to the National Labor Relations Act:"<sup>32</sup>

"The same reasons which militated against the regulation of wages and hours render unlikely the extension of the Act to companies which do a purely local business."

<sup>31</sup>(C. C. A. 1) 87 Fed. (2d) 265.

<sup>32</sup>35 Mich. L. Rev. 1286, 1297.

A definite conflict, then, is apparent—from both the standpoint of purchases, as well as from the standpoint of sales.

**II. The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Honorable Court.**

We adopt here the allegations of the foregoing Petition, in support of this point, at page 11 thereof without further exposition.

**III. The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Honorable Court.**

That the decision below by the Circuit Court of Appeals for the Eighth Circuit runs counter to the philosophy and trend of many prior decisions of this Honorable Court is apparent from a rehearsal of some of this Court's major decisions, under the National Labor Relations Act; under similar or other Federal Acts with a like jurisdictional standard; and, generally, applying the Federal commerce power, as follows:

**(a) Particular Vice of the Lower Court's Decision in Drawing on Purchases of Merchandise, Originating in Other States, for the Stocking of the Shelves of the Local Merchant; as Furnishing a Jurisdictional Base Under the Act**

When the lower Court completely overlooked the significance of the single character of the Petitioner's store as being engaged in only one business, namely, local retail selling over-the-counter on the Store premises, it has, instead, considered the Petitioner's store as also being

engaged in another, or the, business of importing merchandise from other states. It thus violates the standard laid down in the first case decided by this Court under the Act, *National Labor Relations Board v. Jones & Laughlin Steel Corporation*<sup>33</sup> when that case limited its decision on the coverage of the Act, to enterprises "making their relation to interstate commerce the *dominant* factor in their activities." The dominant factor in the Petitioner's store activities is its relation only to local or intrastate commerce, which absorbs 99% of its activities.

Similarly, in *Hopkins v. United States*<sup>34</sup> the defendants were commission merchants on the Kansas City Livestock Market. The action was brought under the Federal Anti-Trust Act. The Court discussed and decided the character of such merchants in the following language:

"We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affects interstate commerce at all, does so only in an indirect and incidental manner?

"\* \* \* *The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the state from other states or from the territories.* \* \* \*

"The character of the business of defendants must, in this case, be determined by the facts occurring at that city." (Emphasis supplied.)

<sup>33</sup>301 U. S. 1, 81 L. ed. 893.

<sup>34</sup>171 U. S. 578, 43 L. ed. 290.

Purchases of stock for the shelves of the Store from outside the state are definitely not a guide or index to the Store's character, as being either intrastate or interstate.

Many decisions from this Court are illustrative of the error into which the lower Court has fallen.

A large array of decisions completely discount or eliminate outstate purchases, for the stocking of local distribution facilities or activities, in the consideration of the question of whether or not the Federal Commerce power envelops the particular enterprise by reason thereof.

As well expressed in the recent case of *Walling v. Jacksonville Paper Company*:<sup>35</sup>

"Hence we cannot conclude that all phases of a wholesale business selling intrastate are covered by the act solely because it makes its purchases interstate."

This holding was made despite the fact that it was urged upon the Court that, because only retail establishments were specifically exempted from the Fair Labor Standards Act, wholesale establishments must be deemed included.

It will be noted that in *Consolidated Edison Company v. National Labor Relations Board*<sup>36</sup> the Circuit Court pronounced that:

"It can scarcely be doubted that the labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of

<sup>35</sup>317 U. S. 564, 571, 87 L. ed. 460, 468.

<sup>36</sup>(C. C. A. 2) 95 Fed. (2d) 390, 393; aff'd 305 U. S. 197, 83 L. ed. 126.

his stock in trade originates outside of the State, or some of his local customers are engaged in interstate commerce."

The Supreme Court, in affirming the foregoing decision, likewise said:<sup>37</sup>

"In the present instance we may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies, of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas. \* \* \*"

In *A. L. A. Schechter Poultry Corporation v. United States*,<sup>38</sup> it will be recalled that the basis of the Act might be said to be as broad and sweeping as that of the National Labor Relations Act, in that it was predicated upon transactions "affecting interstate or foreign commerce." After holding that the hours and wages of those employed in poultry slaughter houses in Brooklyn, and the sales there made to retail dealers and butchers, were not interstate commerce, but were merely local matters, the Court added:

*"The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used or sold by defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other States. \* \* \*"* (Emphasis supplied.)

<sup>37</sup>305 U. S. 220, 83 L. ed. 126, 135.

<sup>38</sup>295 U. S. 495, 79 L. ed. 1570.

It then turned to the question of whether or not the defendants' transactions affected interstate commerce, and the Court said in that respect:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. \* \* \*

"But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control. \* \* \*

"But the authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. \* \* \*"

In Mr. Justice Cardozo's concurring opinion, he said:

"\* \* \* There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. \* \* \*

"The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. \* \* \*

"To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose

and counteract them, there will be an end to our Federal system. \* \* \*

In *Rosenberg Bros. & Co. v. Curtis Brown Co.*<sup>39</sup> officers of a retail store purchasing merchandise in other state were held not subject to service there, the Court holding accordingly to the second headnote (the opinion being by Mr. Justice Brandeis):

“A corporation doing a small retail business in one state is not doing business in another state, so as to be subject to suit there, *merely because it purchases in the latter state a large portion of the merchandise to be sold in its retail store.*” (Emphasis supplied.)

The case of *Rast v. Van Deman & Lewis Co.*<sup>40</sup> involved the delivery by a Florida merchant of coupons or profit-sharing certificates redeemable in premiums in connection with the sales of merchandise at retail. The question was whether a state license tax could be applied thereto on the ground that the coupons or certificates had been inserted in the retail packages by the manufacturer outside of the State, and, therefore, within the protection of the commerce clause, as well as that the coupons or certificates were redeemable outside of the state. The Court, however, held that the transactions were not in interstate commerce and said:

“\* \* \* In other words, they are not designed for or executed through a sale of the original package of importation, but in the packages of retail and sale to the individual purchaser and consumer. This fixes their character as transactions within the state, and not as transactions in interstate commerce, and this is conceded as to the first scheme; it is true as to the second and third schemes. \* \* \*

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<sup>39</sup>260 U. S. 516, 67 L. ed. 372.

<sup>40</sup>240 U. S. 342, 60 L. ed. 679.

"The transactions, therefore, are not in interstate commerce. The sales, as we have said, are not in the packages of that commerce; they are essentially local sales, schemes consummated by such sales, and it is upon them and on account of their effect that the statute has imposed its license tax, and not upon the shipment into the state nor their disposition in the packages of importation. *Of course, there is shipment to Florida merchants, but for the disposition of the merchandise in retail trade.* The schemes contemplate such disposition and are executed by it. \* \* \*." (Emphasis supplied.)

In *Wagner v. Covington*<sup>41</sup> the business involved was that of a manufacturer of soft drinks, who also sold to retailers on both sides of the Ohio River, that is, at Cincinnati, Ohio, where his establishment was located, and opposite thereto at Covington, Kentucky. In resisting a license requirement sought to be imposed by the City of Covington, Kentucky, he asserted that he was engaged in interstate commerce in bringing soft drinks across the state line. The Supreme Court observed that the transportation across the state line was in itself interstate commerce, but that the business of distributing soft drinks to retailers within Covington, Kentucky, was a purely local transaction, and in that connection said:

"So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not."

Therefore, as will be observed, the Court completely divorced the origin of the goods from the local transaction

<sup>41</sup>251 U. S. 95, 64 L. ed. 157.

in order to ascertain its character. To like effect see *Blumenstock Bros. Advertising Agency v. Curtis Publishing Company*,<sup>42</sup> *Ficklen v. Taxing District*,<sup>43</sup> and *Askren v. Continental Oil Co.*,<sup>44</sup> in all of which cases the goods sold emanated from other states or the transaction was in relation to goods moving in interstate commerce, but the transaction was nevertheless considered local and as not affecting interstate commerce. Of like purport is *Moore v. New York Cotton Exchange*,<sup>45</sup> which held that a transaction between cotton exchange members for the purchase and sale of cotton on the spot was local and not interstate business, despite a possible interstate shipment which the transaction would, at least, influence.

So in *Southern Natural Gas Co. v. Alabama*,<sup>46</sup> it was held that service lines carrying gas to large industries within the state were local in character, notwithstanding the fact that the gas entered such local lines from the large interstate mains and as a result of interstate commerce. See also *Best & Company v. Maxwell*.<sup>47</sup>

**(b) Failure of Lower Court to Recognize  
Department Stores as Belonging to  
"Host of Local Enterprises" Judicially  
Excluded From Operation of Act**

This case is directed against an unfair labor practice "affecting commerce" proscribed by Section 8 of the Act. The lode star is, therefore, whether J. L. Brandeis & Sons either is in such interstate commerce or affects inter-

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<sup>42</sup>252 U. S. 436, 64 L. ed. 649.

<sup>43</sup>145 U. S. 1, 36 L. ed. 601.

<sup>44</sup>252 U. S. 444, 64 L. ed. 654.

<sup>45</sup>270 U. S. 604, 70 L. ed. 754.

<sup>46</sup>301 U. S. 148, 57 L. ed. 970.

<sup>47</sup>311 U. S. 454, 85 L. ed. 275.

state commerce, so that it may be said that a question "affecting commerce" has arisen.

It is only necessary to advert to the first pronouncement of this Supreme Court upon the validity of the National Labor Relations Act to perceive its limitations. This Court, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,<sup>48</sup> made the oft-referred to observation that—

"\* \* \* there may be but indirect and remote effects upon interstate commerce in connection with a *host of local enterprises* throughout the Country \* \* \*." (Emphasis supplied.)

What is the "host of local enterprises" which it has been authoritatively adjudicated do not come within the purview of the National Labor Relations Act?

Certainly there is a no more appropriate example than that of the local retail store, for how otherwise could the Supreme Court have contemplated a "host" of local establishments, not subject to the Act, if it left out the local retail stores which are characteristic of every Community in the Nation down to the smallest hamlet?

**(c) Failure to Gauge Effect That Act Does  
Not Extend to All Employers and All  
Employees**

Far from embracing all employees within the Nation, the National Labor Relations Act actually is circumscribed in its operation so as to apply to only certain employers and employees. This Court, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,<sup>49</sup> laid

<sup>48</sup>301 U. S. 1, 30, 81 L. ed. 893, 914.

<sup>49</sup>301 U. S. 1, 30, 81 L. ed. 893, 907, 908, 911.

down as the organic law concerning the sphere of action of the Board the following:

"\* \* \* The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes between commerce 'among the several States' and the internal concerns of a State. That distinction between *what is national* and *what is local* in the activities of commerce is vital to the maintenance of our Federal system. \* \* \*

"*The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers.* Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. \* \* \*

"Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id. The question is necessarily one of degree.* \* \* \*

Similarly, in *Washington, Virginia and Maryland Coach Company v. National Labor Relations Board*,<sup>50</sup> this Court said:

"The contention that the act on its face seeks to regulate labor relations in all employments, whether in interstate commerce or not, is plainly untenable. As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power. \* \* \*

(d) **Failure to Observe Maintenance of Distinction Between "National" and "Local" Matters**

The line of demarcation between what is national and what is local was well expounded by this Supreme Court in *New York ex rel. Pennsylvania R. Co. v. Knight*,<sup>51</sup> where the question at issue was whether a local taxicab service shuttling between the railroad terminal and the hotels was an extension of the interstate commerce carried on by the railroad carriers entering and leaving such terminal. In holding that the taxicab service was an essentially local activity, although intimately related to the interstate activity, which it supplemented and served, the Court said:

"\* \* \* To hold the even balance between the nation and the states in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life and business conditions. Into many relations and transactions there enter elements of a national as well as those of a state character, and to determine in a given case which elements dominate, and assign the relation or transaction to the control of the nation or of the state, is often most perplexing. And this case fully illustrates the perplexities.

"It is true that a passenger over the Pennsylvania Railroad to the city of New York does not, in one sense, fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state, and be subject to national, control. \* \* \* On the other hand, the

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<sup>51</sup>192 U. S. 21, 48 L. ed. 325.

*cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. \* \* \**

“\* \* \* As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? *And where will the limit be placed?*”

“We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation.” (Emphasis supplied.)

It is significant that in the recent decision of *Parker v. Brown*,<sup>52</sup> this Court adhered to—

“The distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for such commerce, and the regulation of those who engage in the commerce by selling the product interstate,”

the Court observing that such distinction served in general as “a ready means of distinguishing” activities, respectively subject to state and national regulation.

A like caution was expressed in *National Labor Relations v. Jones & Laughlin Steel Corporation*<sup>53</sup> and *Santa*

<sup>52</sup>317 U. S. 341, 362, 87 L. ed. 315, 332.

<sup>53</sup>301 U. S. 1, 81 L. ed. 893.

*Cruz Fruit Packing Company v. National Labor Relations Board*.<sup>54</sup>

**(e) Failure to Consider That Effect on Interstate Commerce of Local or Intrastate Commerce Must Be Direct, Immediate and Substantial as Prerequisite to Board's Jurisdiction**

Another restraint laid down by this Court, upon exercise of jurisdiction by the Board, was in *Santa Cruz Fruit Packing Company v. National Labor Relations Board*,<sup>55</sup> which the Court expressed as follows:

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, *it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.* However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce, but the constitutional differentiation still obtains. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 546, 79 L. ed. 1570, 1588, 55 S. Ct. 837, 97 A. L. R. 947. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.'

"To express this essential distinction, 'direct' has been contrasted with 'indirect' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is

<sup>54</sup>303 U. S. 453, 460, 82 L. ed. 954, 957.

<sup>55</sup>303 U. S. 453, 466, 82 L. ed. 954, 960.

necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' \* \* \* (Emphasis supplied.)

In *Anderson v. United States*,<sup>56</sup> the issue involved the buying and selling of cattle emanating from different States at the Kansas City Stock Yards. A Bill was brought under the Federal Anti-Trust Act against Yard traders on account of their association as the Traders Livestock Exchange. As stated, the cattle came from various States and were placed on sale at the Stock Yards, which formed the only available market for many miles around. Repelling the contention of Federal jurisdiction, the Court decided:

"\* \* \* While in case all the yard traders are not induced to become members of the association, and those who are such members refuse to recognize the others in business, we can see no such direct necessary or natural connection between that fact and the restraint of interstate commerce as to render the agreement not to recognize them void for that reason. *A claim that such refusal may thereby lessen the number of active traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so affect interstate trade, is entirely too remote and fanciful to be accepted as valid.* \* \* \*

"They can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress. \* \* \* (Emphasis supplied.)

To similar effect, and requiring that the labor dispute must directly burden or obstruct or affect interstate com-

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<sup>56</sup>171 U. S. 604, 43 L. ed. 300.

merce, see, also, *National Labor Relations Board v. Fainblatt*,<sup>57</sup> in which case the Court held that the unfair labor practices involved must have—

“such a close and substantial relation to the freedom of interstate commerce from injurious restraint that those practices may constitutionally be made the subject of federal cognizance.”

In the more recent case of *U. S. v. Wrightwood Dairy Company*,<sup>58</sup> the “reach of the power of Congress” over interstate commerce was held to extend to—

“those intrastate activities which in a *substantial way* interfere with or obstruct the exercise of the granted power.” (Emphasis supplied.)

The application of the foregoing rule to the National Labor Relations Act finds particular expression in the article on “Business Subject to the National Labor Relations Act”<sup>59</sup> where the author after referring to the *Jones & Laughlin case* makes the following observations:

“In other words, the application of the act is to be confined to those enterprises in which a dispute concerning labor relations may be said to interfere with the movement of commerce among the states. The test in each case, therefore, is whether a strike or other disturbance on the part of the employees engaged in the particular business involved would operate as a burden upon commerce. \* \* \*

“Normally a stoppage of operations due to labor difficulties in a particular enterprise engaged in production or distribution will not interfere with the movement of goods among the states. It will interfere only if the company affected does a substantial interstate business.”

<sup>57</sup>306 U. S. 601, 83 L. ed. 1015.

<sup>58</sup>315 U. S. 110, 86 L. ed. 726.

<sup>59</sup>35 Mich. L. Rev. 1289, 1294.

**(f) Failure to Recognize the Traditional and Time-Honored Distinction, Removing From Federal Control Local Businesses**

In *Federal Trade Commission v. Bunte Brothers, Inc.*,<sup>60</sup> the Federal Trade Commission had argued that it could proscribe unfair methods used in intrastate sales when they resulted in a handicap on interstate competitors. But the Court answered—

“The construction of Section 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. \* \* \*”

Thus, we again have an admonition from this Court to Federal agencies to not exercise their jurisdiction over a “host of local enterprises,” or, as here, “myriads of local businesses” unless specifically granted—and the meaning of the Court cannot be mistaken, inasmuch as the cited case dealt with a manufacturer of candy and, therefore, the “local enterprises” or “local businesses” were necessarily the retail media or outlets, to which such manufacturer sold.

**(g) Failure to Follow Characterizations by This Court of the Intrastate Quality of “Goods Acquired and Held by a Local Merchant for Local Disposition” in Recent “Wholesale” Cases**

We invite particular attention to the recent pronouncement by this Court in *McLeod v. Threlkeld*,<sup>61</sup> con-

<sup>60</sup>312 U. S. 349, 355, 85 L. ed. 881, 885.

<sup>61</sup>319 U. S. 491, 494, 87 L. ed. 1538, 1541.

cerning a related subject, where the opinion rendered by Mr. Justice Reed states:

"So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, *while those employees who handle goods after acquisition by a merchant for general local disposition are not.*" (Emphasis supplied.)

In *Walling v. Jacksonville Paper Company*,<sup>62</sup> this Court in considering the business of a wholesaler under the Fair Labor Standards Act adverted to the "stream of commerce" concept, and said per Mr. Justice Douglas:

"We do not believe, however, that on this phase of the case such a course of business is revealed by this record. The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from *goods acquired and held by a local merchant for local disposition,*" (Emphasis supplied.

thus, clearly indicating the "local merchant" as outside of the "stream of commerce" concept extending federal control to intrastate business.

See, also, *Higgins v. Carr Brothers Company*.<sup>63</sup>

In *American Steel & Wire Company v. Speed*<sup>64</sup> goods placed in the warehouse in a city for local distribution were likewise held to have reached their destination and to be no longer in transit and, consequently, to have become the subject of local commerce. To like effect, see *Dalton Adding Machine Company v. Commonwealth*.<sup>65</sup>

<sup>62</sup>317 U. S. 564, 570, 87 L. ed. 460, 467.

<sup>63</sup>317 U. S. 572, 574, 87 L. ed. 468, 471.

<sup>64</sup>192 U. S. 500, 48 L. ed. 538.

<sup>65</sup>246 U. S. 498, 62 L. ed. 851.

**(h) Failure to Follow Decisions Under Federal Acts With a Like Jurisdictional Standard, Labeling Local Activities as Having Only an Indirect or Local Effect on Interstate Commerce**

We here refer to the case of *A. L. A. Schechter Poultry Corporation v. United States*, *supra*.

**(i) Failure to Apply the "De Minimis" Doctrine to a Minor or Negligible Quantum of Interstate or Quasi-Interstate Sales**

We confidently assert that the "de minimis" doctrine applies.<sup>66</sup> A bare 1% of total sales certainly is encompassed by the "de minimis" doctrine.

This is not to say that the commerce power does not extend to an interstate transaction, be it great or small; it is, however, an assertion that, where the search is whether or not a labor dispute will burden or obstruct interstate commerce, an enterprise with only a one per cent interstate business cannot by any stretch of the imagination be considered to threaten either a burden or an obstruction to interstate commerce.

**(j) Over-Ascribing Importance to Advertising, Soliciting Only Over-the-Counter Intrastate Sales**

The lower Court has likewise placed great stress upon the small circulation in Iowa of the Omaha Daily Newspaper, as well as the negligible advertising carried in the Council Bluffs, Iowa, Newspaper. There is no

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<sup>66</sup>*National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 307 U. S. 609, 83 L. ed. 1014.

showing in this record that any interstate sales were solicited thereby. On the contrary, only intrastate or over-the-counter sales were sought. The record is uncontradicted that the Store, because of many considerations, did not seek Iowa business, but only such business as gravitated to the Store by reason of Iowa workers or visitors coming into Omaha.

Such advertising, however, cannot aid the Board's jurisdiction. As stated in an article on "Interstate Commerce and the National Labor Relations Board,"<sup>67</sup>

"In some cases the conduct of the employer's business is an unspoken admission that he is engaged in competition for an interstate market."

This statement is supported by citations of Board Decisions which show *national* advertising, *national* distribution of salesmen, or use of *nationally* recognized labels. There is nothing of that character in this case; on the contrary, we find here the direct antithesis thereof. The Store had no aspirations for an interstate market.

Furthermore, mere advertising does not give an interstate commerce character. In *Blumenstock Bros. Advertising Agency v. Curtis Publishing Company*<sup>68</sup> it was held that the mere incidental relation to interstate commerce of transactions concerning advertising in periodicals to be circulated through the United States would not support an Anti-Trust Act proceeding.

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<sup>67</sup>52 Harv. Law Rev. 490, 492.

<sup>68</sup>252 U. S. 436, 64 L. ed. 649.

(k) **Failure to Observe Judicial Holdings of Absence of Burden on Interstate Commerce to Appreciable Extent by a Local Labor Dispute, Even Though Local Business Seriously Disrupted**

We advert to actual adjudications where this Court has encountered threatened or impending labor disputes and has been called upon to pass on the possible effects thereof on interstate commerce.

*Industrial Association of San Francisco v. United States*<sup>69</sup> involved an inquiry into local practices designed to break up a closed shop front in the building trade industry. This Court proceeded to hold:

“The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter; namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. \* \* \*

“No doubt there was such an interference, but the extent of it, being neither shown nor perhaps capable of being shown, is a matter of surmise. \* \* \*

“The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing, or growing crops,—and *if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.* \* \* \*

“The four cases and the one here, considered together, clearly illustrate the vital difference, under the Sherman Act, between a direct, substantial, and

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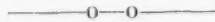
<sup>69</sup>268 U. S. 64, 69 L. ed. 849.

intentional interference with interstate commerce, and an interference which is incidental, indirect, remote and outside the purposes of those causing it." (Emphasis supplied.)

Other decisions to like effect are cited in the footnote.<sup>70</sup>

#### **IV. The Questions Presented Herein Are of Great Public Importance.**

We adopt herein, and will not further expand, the reasons adduced on this topic in the foregoing Petition at page 17 thereof.



#### **CONCLUSION**

We respectfully submit that the foregoing brief demonstrates more than adequate, probable cause for the grant of Certiorari in this case. Certainly, the decision of the lower Court is not only in conflict with like and apposite decisions or holdings of the Circuit Courts of Appeals in other Circuits, but is demonstrably in probable conflict with applicable decisions of this Honorable Court. An important question of Federal Law, for the first time, is presented to this Court, of great influence upon the Labor Relations of a vast—the distribution or retailing—segment of the Nation's business. This Honorable Court's discretion should, therefore, be exercised

<sup>70</sup>*United Mine Workers v. Coronado Coal Company*, 259 U. S. 344, 410, 66 L. ed. 975; *United Leather Workers v. Herkert & Meisel Trunk Company*, 265 U. S. 457, 68 L. ed. 1104. It is noteworthy that this Court in *National Labor Relations Board v. Fainblatt*, supra, relied heavily upon Sherman Anti-Trust Act cases, involving labor disputes, to demonstrate that interruption of intrastate activities could result in restraint of interstate commerce "where the cessation of manufacture necessarily results in the cessation of the movement of the manufactured product in interstate commerce."

in favor of the grant of Certiorari, that this important question of the coverage of the National Labor Relations Act, with respect to retail selling activities, may be settled by final decision of this Court.

Dated at Omaha, Nebraska, August 12, 1944.

Respectfully submitted,

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**APPENDIX**

Excerpts from the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151, et seq.):

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours,

or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual em-

ployed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

\* \* \* \* \*

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

\* \* \* \* \*

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Section 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting em-

ployees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9 (a).

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: PROVIDED, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their

right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

\* \* \* \* \*

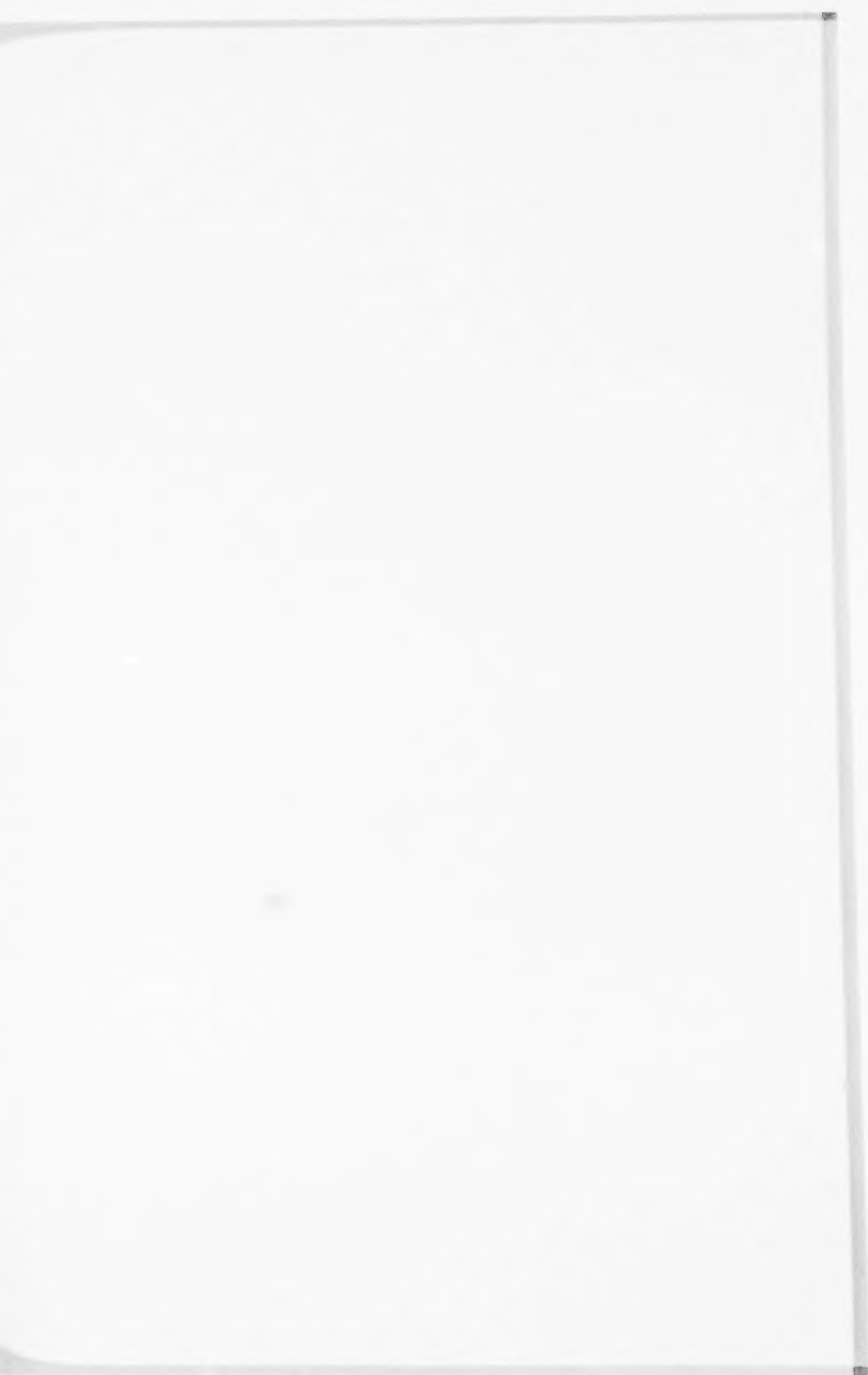
Section 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency, conducting the hearing, or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing

and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

\* \* \* \* \*



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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 385

J. L. BRANDEIS & SONS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT*

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN  
OPPOSITION**

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## OPINIONS BELOW

The opinion of the court below (R. 3, 4-12)<sup>1</sup> is reported in 142 F. (2d) 977. The findings of

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<sup>1</sup> In referring to the record the same method is used as that followed in the petition for certiorari (Pet. 2). References to the record certified by the Circuit Court of Appeals, containing the petition to review and answer in the court below, together with the pleadings before the National Labor Relations Board, are designated "(R. 1, —)." References to volumes 1 and 2, printed by petitioner as an Appendix to its brief in the court below, are designated respectively "(R. 2, —)" and "(R. 2a, —)." References to the volume containing the opinion of the court below, the decree, petitioner's motion for a stay, and the order staying the issuance of a certified copy of such decree, are designated "(R. 3, —)."

fact, conclusions of law, and order of the National Labor Relations Board (R. 1, 67-76) are reported in 53 N. L. R. B. 352.

#### **JURISDICTION**

The decree of the court below (R. 3, 12-14) was entered on June 23, 1944. The petition for a writ of certiorari was filed on August 22, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

#### **QUESTION PRESENTED**

The only question presented is whether the National Labor Relations Act is applicable to petitioner, which owns and operates a large department store in Omaha, Nebraska.

#### **STATUTE INVOLVED**

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

#### **STATEMENT**

Upon the usual proceedings, and pursuant to a stipulated record (R. 1, 37-46) the Board, on November 3, 1943, found that petitioner had engaged in certain unfair labor practices affecting commerce. Accordingly, the Board entered the order involved here (R. 1, 67-76). The Board's findings concerning the applicability of the Act to

petitioner (R. 1, 69-71) may be summarized as follows:<sup>2</sup>

Petitioner, a Nebraska corporation, owns and operates a retail department store in Omaha, Nebraska (R. 1, 69-70; R. 2, 9-10, 55). During the fiscal year ended January 31, 1943, petitioner purchased nearly \$5,000,000 worth of merchandise for resale, of which about 75 percent, valued at more than \$3,700,000, was purchased in States other than Nebraska, and was delivered to petitioner from points outside Nebraska (R. 1, 70; R. 1, 40, R. 2, 38). During the same period petitioner's total sales amounted to \$7,730,630, of which approximately \$150,000 worth were made to out-of-State customers (R. 1, 70; R. 2, 52, R. 2a, 512). Petitioner's mail orders for the fiscal year ended January 31, 1943, were approximately valued at \$121,274, of which about \$20,799 represented mail order sales to customers outside Nebraska (R. 1, 70; R. 2a, 513). During the same period respondent caused to be delivered to customers outside Nebraska approximately 8,900 packages (R. 1, 70; R. 2, 48-49). In order to promote sales, petitioner advertises extensively in the *Omaha World Herald*, which has a substantial circulation in the neighboring State of Iowa, and in the *Non Pariel*, a newspaper published and circulated in Council Bluffs, Iowa (R. 1, 70; R. 2, 17-18, 19, 26, R. 2a, 511).

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<sup>2</sup> In the following statements the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Upon these facts the Board concluded that petitioner was subject to the Act (R. 1, 69-71). On December 6, 1943, the petitioner filed a petition in the Circuit Court of Appeals for the Eighth Circuit to review and set aside the Board's order (R. 1, 1-9). The Board requested dismissal of the petition for review and enforcement of its order (R. 1, 9-14). On June 7 and June 23, 1944, respectively, the court below handed down its decision and decree enforcing the Board's order in full (R. 3, 4-12, 12-14).

#### ARGUMENT

The Board and the court below, upon full consideration of the relevant facts, determined that petitioner's activities fall within the scope of the Act. We think that their determination was correct, and that there is no occasion for further review. No questions of general importance are presented, and no conflict of decisions is shown.<sup>3</sup>

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<sup>3</sup> The general dicta concerning the Board's jurisdiction in *Consolidated Edison Company v. National Labor Relations Board*, 95 F. (2d) 390, 393-394 (C. C. A. 2), *aff'd*, 305 U. S. 197, 220, and *National Labor Relations Board v. White Swan Company*, 118 F. (2d) 1002 (C. C. A. 4), upon which petitioner relies (Pet. 10, 24-26), do not create any conflict of decisions. The facts in both cases were wholly different from those here presented; and, in any event, the Board's jurisdiction was sustained in both cases. *Schroepfer v. A. S. Abell Co.*, 138 F. (2d) 111 (C. C. A. 4) arose under the Fair Labor Standards Act and merely shows that the same company may be exempt from that statute under the narrower concept of "in commerce" and yet be amenable to the National Labor Relations Act under the broader concept of

Petitioner annually sells and distributes merchandise valued at more than \$3,700,000, which is received through the usual channels of interstate commerce. This fact alone brings petitioner within the ambit of the commerce clause. Cf. *Local 167, International Brotherhood of Teamsters v. United States*, 291 U. S. 293, 297; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290-291; *Newport News Shipbuilding & Dry Dock Co. v. National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241; *Virginia Electric & Power Co. v. National Labor Relations Board*, 115 F. (2d) 414, 416 (C. C. A. 4), reversed and remanded on other grounds, 314 U. S. 469, 476; *National Labor Relations Board v. J. L. Hudson Co.*, 135 F. (2d) 380 (C. C. A. 6), certiorari denied, 320 U. S. 740.

An additional basis for the exercise of federal authority is found in the fact that petitioner, as a result of advertising through media having a substantial out-of-State circulation (*supra*, p. 3), annually sells to out-of-State customers, merchandise valued at more than \$150,000 (*supra*, p. 3).<sup>4</sup>

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"affecting commerce." *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4). See also *McLeod v. Threlkeld*, 319 U. S. 491, 493.

<sup>4</sup> The maxim "*de minimis*" is not, as petitioner argues (Pet. 54), applicable here. It has been frequently held that the Act "cannot be applied by a mere reference to percentages." *Santa Cruz Fruit Packing Company v. National Labor Re-*

In determining whether the Act may be applied to petitioner's operations, the test is not merely, as petitioner suggests (Pet. 11, 12, 13, 25), the type of enterprise conducted, nor whether its relation to interstate commerce is "direct" or "indirect." It is now settled that in adopting the National Labor Relations Act, Congress intended to exercise the full scope of its power under the commerce clause. See *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 607, and cases cited. In a recent statement of the scope of the commerce power, this Court in *Wickard v. Filburn*, 317 U. S. 111, 125, said:

But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

That test is met here. Stoppage of petitioner's operations would unquestionably exert a substantial economic effect upon the inflow of large

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*lations Board*, 303 U. S. 453, 467; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 607-608; *National Labor Relations Board v. Crowe Coal Co.*, 104 F. (2d) 633, 639 (C. C. A. 8), certiorari denied, 308 U. S. 584; *National Labor Relations Board v. Central Missouri Tel. Co.*, 115 F. (2d) 563, 566 (C. C. A. 8); *National Labor Relations Board v. J. G. Boswell Co.*, 136 F. (2d) 585, 589 (C. C. A. 9).

amounts of products normally obtained from within the State, as well as on the outflow of commodities purchased by out-of-State customers. "If the flow of commerce is obstructed by labor disputes, it can make no difference from which direction the obstruction is applied." *Newport News Shipbuilding & Dry Dock Co. v. National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241. See *National Labor Relations Board v. Bradford Dyeing Ass'n*, 310 U. S. 318, 326; *National Labor Relations Board v. J. L. Hudson Co.*, 135 F. (2d) 380, 382, 383 (C. C. A. 6), certiorari denied, 320 U. S. 740.<sup>5</sup>

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<sup>5</sup> Petitioner's reliance upon cases arising under the Fair Labor Standards Act, the Federal Trade Commission Act, and the Sherman Act (Pet. 28-56), is misplaced. See *McLeod v. Threlkeld*, 319 U. S. 491, 493; *Kirschbaum Co. v. Walling*, 316 U. S. 517, 520-521; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570-571; *Trade Commission v. Bunte Bros.*, 312 U. S. 349, 350-351; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 486, 490-493, 498, 500-501; *Wickard v. Filburn*, 317 U. S. 111. Nor are cases dealing with the question whether a particular state tax or police measure (Pet. 42) is in conflict with the commerce clause, applicable here. See *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466; *Bacon v. Illinois*, 227 U. S. 504, 516; *Stafford v. Wallace*, 258 U. S. 495; *Minnesota v. Blasius*, 290 U. S. 1, 8. This Court has recently declared that the two cases under the Sherman Act on which petitioner places great reliance, namely, *Hopkins v. United States*, 171 U. S. 578 and *Anderson v. United States*, 171 U. S. 604 (Pet., 15, 38; 13, 50), are both out of harmony with its more recent decisions under the commerce clause. See *Wickard v. Filburn*, 317 U. S. 111, 122, n. 20.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

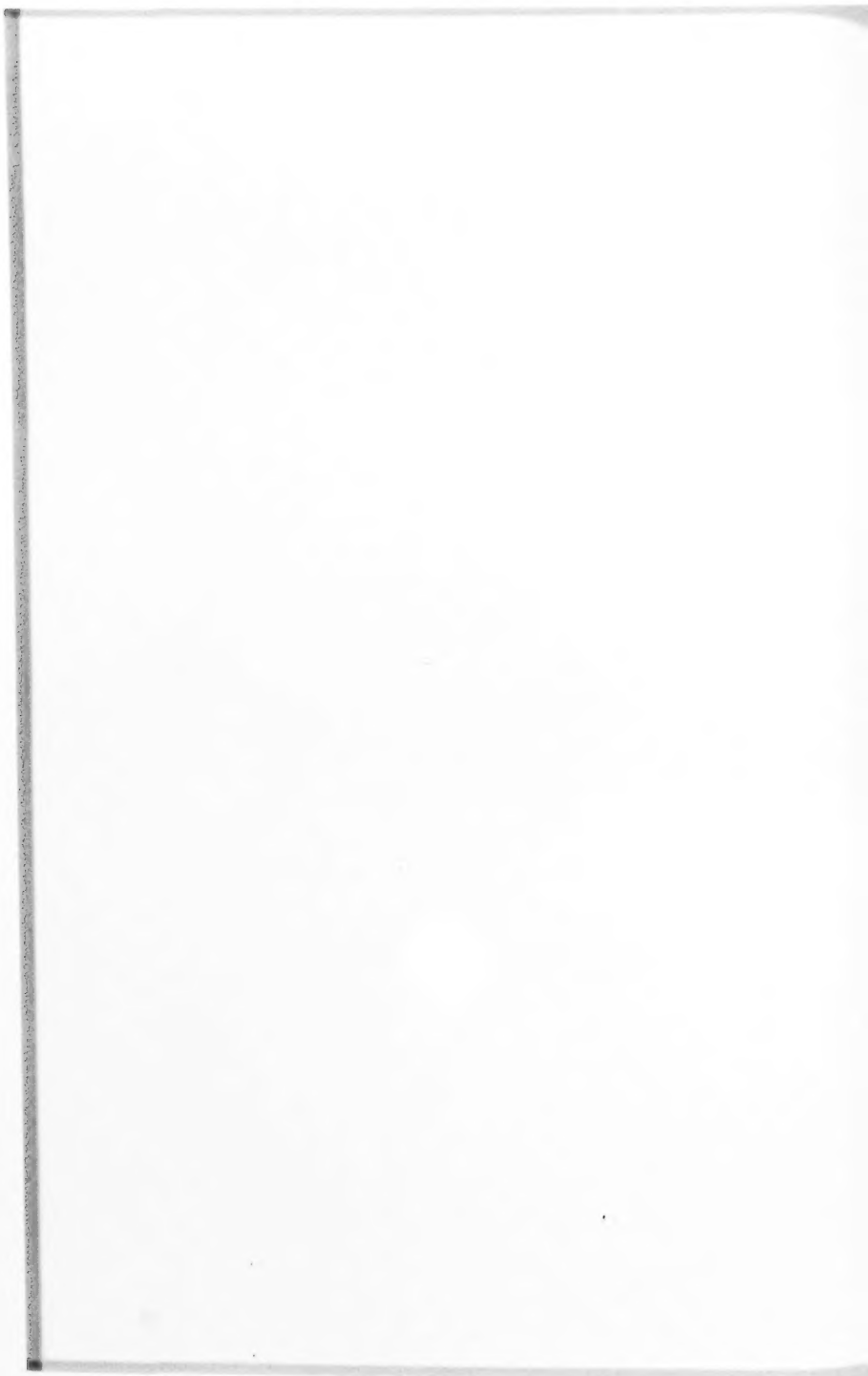
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SEPTEMBER 1944.





## APPENDIX

The National Labor Relations Act, 49 Stat. 449, 29 U. S. C. 151, *et seq.*, provides in pertinent part as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

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by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. \* \* \*

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but

through any other State or any Territory or the District of Columbia or any foreign country.

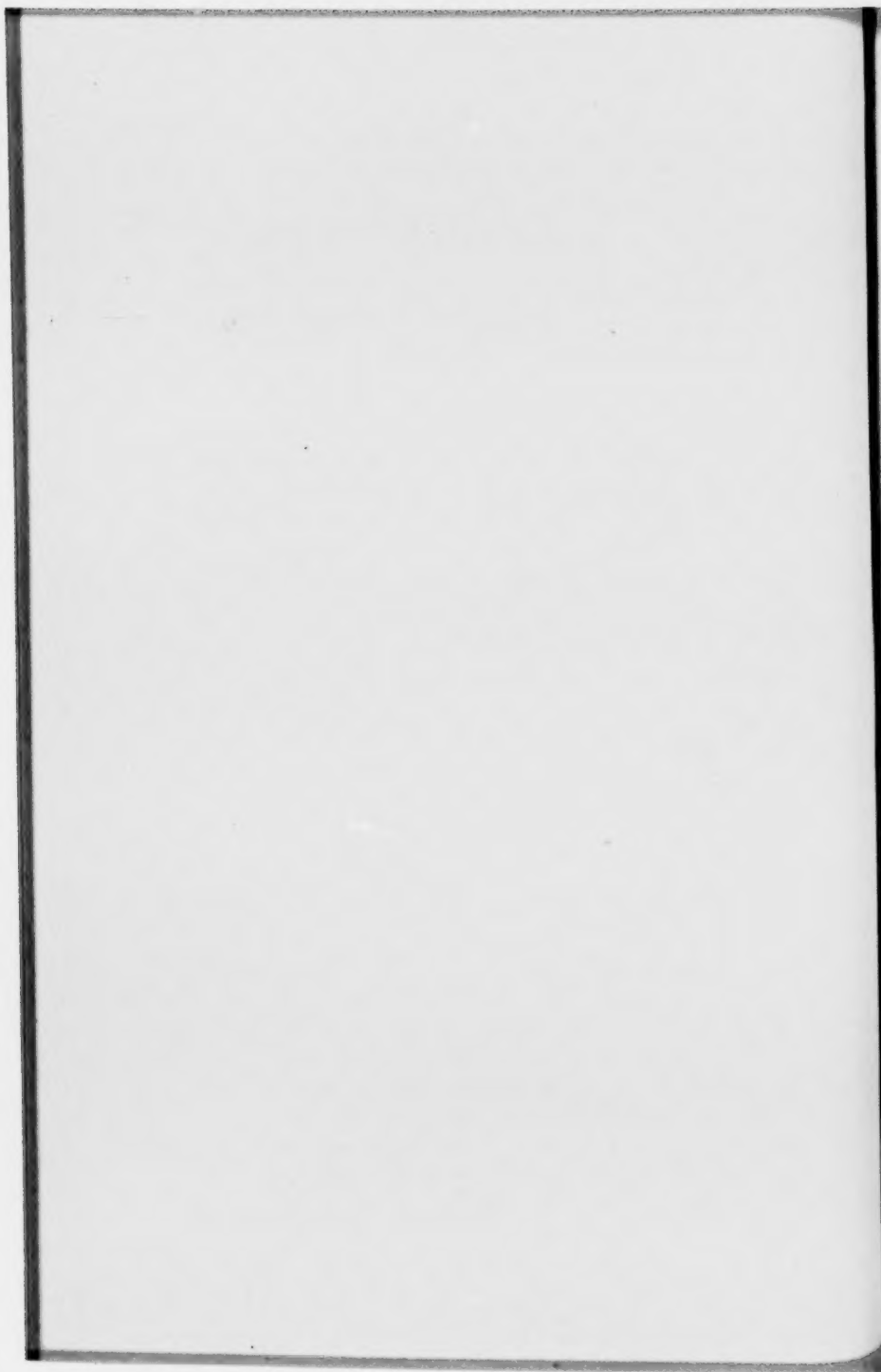
(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

\* \* \* \* \*

SEC. 10. (a) The Board is empowered, as herinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

\* \* \*

\* \* \* \* \*



(28)

OCT 10 1944

CHARLES EDWARD DROPLEY  
CLERK

**IN THE  
Supreme Court of the United States**

— 0 — 0 —  
**October Term, 1944**

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**No. 385**

— 0 — 0 —  
**J. L. BRANDEIS & SONS,**

*Petitioner,*

**vs.**

**NATIONAL LABOR RELATIONS BOARD,**

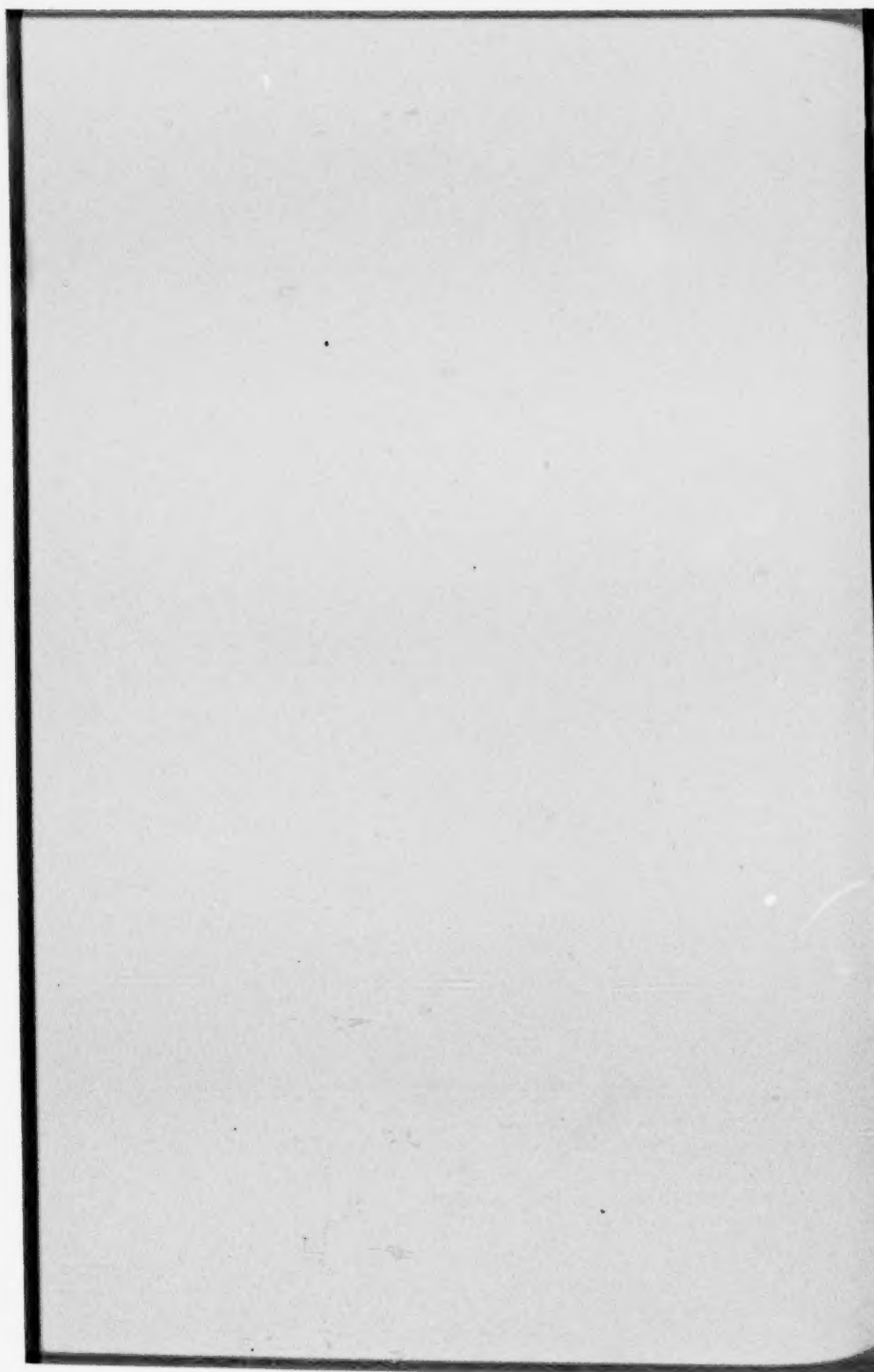
*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**REPLY BRIEF OF PETITIONER**

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**IN THE**  
**Supreme Court of the United States**

— o — o —  
**October Term, 1944**

— o — o —  
**No. 385**

— o — o —  
**J. L. BRANDEIS & SONS,**

*Petitioner,*

**vs.**

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

— o — o —  
**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

— o — o —  
**REPLY BRIEF OF PETITIONER**

— o — o —  
*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

This Brief is filed pursuant to Supreme Court Rule 38 (4) (a) in reply to the Brief filed herein for the Respondent, National Labor Relations Board, in opposition to the Petition for Writ of Certiorari.

## PRELIMINARY STATEMENT

This Reply Brief is occasioned by the facts that such Brief in Opposition—

- (a) Understates in its "Statement" (page 2 of Board's Brief) the facts in certain important respects.<sup>1</sup>
- (b) Does not address itself to the grant vel non of Certiorari.<sup>2</sup>

- 
- 1 The Statements on page 3 should be amplified by the detail in Footnote 6 on page 5 of the Petitioner's Petition, which throws an entirely different complexion upon the assertions of fact made in the Board's Brief. Thus, "approximately \$150,000 worth (of total sales) were made to out-of-state customers" (repeated, again, at page 5 of the Board's Brief) is delusory in the light of the further fact that two-thirds of such sales were made and completed on the Store premises; again "Petitioner's mail orders \* \* \* were approximately valued at \$121,274" is incomplete without the further explanation that they represented in large part merchandise purchased by local customers but sent away as gifts to relatives, to children away in school, to customers while on vacations and so on, and, thus, represented only a casual, incidental or occasional departure from the usual and characteristic course of a business, devoted to local retail sales.
  - 2 The Board's challenge to the grant of Certiorari is contained in one sentence at the bottom of page 4 of the Board's Brief. But the exactly contra holding in **Consolidated Edison Company v. National Labor Relations Board** (C. C. A. 2), 95 Fed. (2d) 390, 393, aff'd 305 U. S. 197, 83 L. ed. 126, that " \* \* \* the labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside of the State," cannot properly be denominated dictum, when this Court, in affirming, said thereof, " \* \* \* We may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies \* \* \* which come from without the state \* \* \*"; nor can the holding in **National Labor Relations Board v. White Swan Company** (C. C. A. 4), 118 Fed. (2d) 1002, certificate returned unanswered, 313 U. S. 23, 85 L. ed. 1164, "that the volume of interstate business involved in the purchase of supplies is not sufficient to bring the business of Respondent within the jurisdiction of the Board" be called dictum, when it was one of the two grounds upon which jurisdiction was predicated and decided.

- (c) Endeavors to deal, instead, with the merits of the Jurisdictional Question—the applicability of the National Labor Relations Act—posed by this case.

### REBUTTAL

The Board's Brief in opposition, rather than indicating an absence of conflict in lower Court decisions as well as with decisions of this Court, confirms such conflict in discussing the following bases, upon which the Court below predicated applicability of the National Labor Relations Act to the Petitioner's retail Store.

#### **Stocking of Shelves of Store Through Interstate Channels**

No decision by this Court under the National Labor Relations Act is cited to sustain the assertion that "this fact (the supplying of its shelves with merchandise obtained principally from out-state sources) alone brings Petitioner within the ambit of the commerce clause." Under such a criterion, every business, we submit, would be within its ambit and, therefore, within the coverage of the Act, as practically no mercantile or other like enterprise is wholly integral to the State of its location—the Nation is not that Balkanized. The cases which are cited at page 5 of the Board's Brief, emanating from this Court, not only do not so demonstrate but are patently distinguishable,<sup>3</sup> or are opposed in concept to the cases cited

3 **Local 167, International Brotherhood of Teamsters v. United States**, 291 U. S. 293, 297, 78 L. ed. 804, involved the Sherman Anti-Trust Act, rather than the National Labor Relations Act, and expressly conceded at page 297 (808): "It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers, the movement of the poultry ceases to be interstate commerce"; **Dahnke-Walker Milling Company v. Bondurant**, 257 U. S. 282, 66 L. ed. 239, involved a state licensing statute and its application to an interstate commerce transaction, but it was distinguished in **Kansas City Structural Steel Company v. Arkansas**, 269 U. S. 148,

in Petitioner's Brief (and not distinguished in the Board's Brief),<sup>4</sup> or reflect Circuit Court of Appeals decisions<sup>5</sup>

3 (Continued)

151, 70 L. ed. 204, 205, when such decision pointed out that the local transaction in the latter case was "separate and distinct from any interstate commerce that might be involved in the performance of the contract," and the Court there added, "the fact that the materials had moved from Missouri into Arkansas did not make the delivery of them to the sub-contractor interstate commerce. So far as concerns the question here involved, the situation is the equivalent of what it would have been if the materials would have been shipped into the state and held for sale in a warehouse, and had been furnished to the sub-contractor by a dealer," and was, therefore, intrastate commerce, notwithstanding the origin of the materials.

- 4 The business actually done by the Petitioner is the yardstick. "If the goods are shipped into a state without a previous sale, any sale within the state is intrastate commerce." **Gavit on Commerce Clause**, Sec. 68, p. 121. "The dividing line between an interstate sale and an intrastate sale depends upon whether or not the sale precedes or succeeds the arrival of the goods in the state, unless it be a sale in the original package. So, again, that line prima facie constitutes the dividing line between state and federal jurisdiction. A sale of goods which succeeds the arrival of the goods within the state, and which is not a sale in the original package, is intrastate commerce \* \* \*," *id.* Sec. 148, p. 311. There is, therefore, no occasion for pursuing an indefinite nexus to perceive an interstate connection, when such roaming through the environs of the Store's operations at best discloses only a remote, incidental or indirect effect on the actual business done, viz., local retail sales.
- 5 **Virginia Electric & Power Company v. National Labor Relations Board** (C. C. A. 4), 115 Fed. (2d) 414, rev'd on other grounds 314 U. S. 469, 86 L. ed. 348, involved a utility business of "unitary character," the Respondent admitting its electrical business was engaged in interstate commerce and subject to the Act, and its gas business being held inseparable because of "repercussions in other departments" and, is, therefore, of no influence on this case: **National Labor Relations Board v. J. L. Hudson Company** (C. C. A. 6), 135 Fed. (2d) 380, cert. den. 320 U. S. 740, 88 L. ed. (adv. ops.) 27, involved a department store, but the jurisdiction was expressly placed on the national advertising, the use of federal trade-marks, the "enormous" character of the store (the third largest in the Country), its "vast operations," and other characteristics, giving it a national character, decidedly not obtaining in this case.

emphasizing the dissonance between Circuits on this topic.

**Minimal Sales to Out-of-State Customers,  
but Largely Completed on Store Premises,  
Within "De Minimis" Doctrine**

That the "de minimis" doctrine is applicable to an inquiry as to the coverage of the Act is beyond cavil,<sup>6</sup> having already been declared by this Court with respect to the Act.<sup>7</sup>

**"Direct" Effect on Interstate Commerce  
Is the Explicit Requirement of This  
Court's Decisions Under the Act**

In decisions rendered by this Court under the Act, the requirement is explicit that, in order that the Act may apply, the effect of a threatened labor dispute on Interstate Commerce must be direct, rather than indirect.<sup>8</sup> A

6 There is no contention here that percentages, as, for instance, that the character, as being major or not, is exemplified by operations being either more or less than fifty per cent, are influential on the result; the issue here is whether a mere one per cent gives character to the entire one hundred per cent of operations.

7 In *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 83 L. ed. 1014, Mr. Justice Stone, twice in the course of the opinion, excluded from jurisdictional inquiry the minor fractions of interstate commerce, embraced within the "de minimis" doctrine, when he said that " \* \* \* Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication," and, again, in negating any intention of Congress to make the operation of the Act dependent on any particular volume of commerce affected, he added the qualification—"More than that to which Courts would apply the maxim de minimis."

8 See cases cited at pages 49 to 51 and 47 to 49 of the Petitioner's Brief. See, also, the Employers' Liability Case (*Howard v. Illinois C. R. Co.*), 207 U. S. 463, 52 L. ed. 297, "although such local business may indirectly be related to interstate commerce."

decision rendered by this Court, not requiring such directness, with respect to a different kind of Act (although under the same commerce power), portrays no parallel, where the Act, in this case, and the statute, under consideration in the other case, have totally different objectives and demonstrate a far different envelopment of the subject of regulation.<sup>9</sup>

### **Retailing Distinguished From Manufacturing**

Likewise, the repercussions, emanating from a labor dispute and halting a manufacturing operation,<sup>10</sup> cannot

9 **Wickard v. Filburn**, 317 U. S. 111, 87 L. ed. 122, cited by the Board, dealt with the Agricultural Adjustment Act, the general scheme of which "as related to wheat, is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce." Congress, therefore, directly encompassed "those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power," production of wheat exerting "a substantial economic effect on interstate commerce" and the effect of the statute being "to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs." To demonstrate such substantial economic effect in that case "the parties have stipulated a summary of the economics of the wheat industry"—such stipulation and consequent summary being notably absent in this case, and the economic effect, if any, therefore, here being left to surmise or divination.

10 The stress laid in the Board's Brief on **Newport News Ship Building & Dry Dock Company v. National Labor Relations Board** (C. C. A. 4), 101 Fed. (2d) 481, mod. 308 U. S. 241, 84 L. ed. 219, significantly omits from the quotation of a single sentence therefrom, at page 7 of the Board's Brief, a revealing prior sentence, namely, "there can be no difference in principle between the case in which manufacture proceeds and that in which it follows interstate commerce." The following sentence, alone quoted in the Board's Brief, to the effect that it can make no difference from which direction an obstruction by labor disputes is applied to the flow of commerce, then reveals that the isolated sentence relates only to a

properly be assimilated to the wholly distinct retail or distribution activity, conventionally relegated to the state domain,<sup>11</sup> and outside of the influence of the Federal Commerce Power. A complete erasure of our dual system of Government results, if specious tests are applied which do not distinguish the wholly local retail activities,<sup>12</sup> in-

10 (Continued)

manufacturing operation. The manufacturing process finds mention in the preamble or predicate of the Act (see Section 1), whereas the retailing or distribution process significantly finds no mention therein. This Court, however, has never made a like statement, although manufacturing cases under the Act have been before it. On the contrary, this Court has momentarily immobilized an otherwise continuous movement to ascertain a purely local or intrastate phase under scrutiny and state its character. **Utah Power & Light Company v. Pfost**, 286 U. S. 165, 76 L. ed. 1038.

- 11 As this Court observed in the Trade-Mark Cases (**United States v. Steffens**), 100 U. S. 82, 25 L. ed. 550: " \* \* there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress. \* \* \* If it (the Congressional Act) is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress." So, in **United States v. DeWitt**, 9 Wall. (76 U. S.) 41, 19 L. ed. 593, this Court observed: "But this express grant of power to regulate commerce among the states has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate states."
- 12 Local retail sales are clearly outside of the ambit of the commerce power. **Banker Brothers Company v. Pennsylvania**, 222 U. S. 210, 56 L. ed. 168 (with respect to a dealer in automobiles furnished to the local purchaser, after his order to the dealer, from outside the state); **Mutual Film Corporation v. Industrial Commission**, 236 U. S. 230, 59 L. ed. 552 (with respect to a film exchange distributing moving picture films to local exhibitors from outside of the state); **Kehrer v. Stewart**, 197 U. S. 60, 49 L. ed. 663 (with respect to a meat packer's branch house, distributing meats to the local trade, the Court adding: "In carrying on the domestic busi-

dicative of the commercial activities properly outside of the periphery of the Act.<sup>13</sup>

### **Connection With Interstate Commerce Wholly Incidental in Judicial View**

On the contrary, a review of the decisions of this Court in the field, where local and interstate commerce to some extent become intertwined, demonstrates that the business done by the Petitioner's Store here—local retail selling—affects interstate commerce only remotely, indirectly or incidentally.<sup>14</sup>

12 (Continued)

ness, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade.")

13 Not embraced in the Act by a specific Congressional predicate, as in the Packers and Stockyards Act, giving rise to the there applicable "current of commerce" concept (see **Stafford v. Wallace**, 258 U. S. 495, 66 L. ed. 735) or where the "subjects of it (the Commerce Power) are national in their character" (see **Robbins v. Taxing District of Shelby County**, 120 U. S. 489, 30 L. ed. 694).

14 **Wiloil Corporation v. Pennsylvania**, 294 U. S. 169, 79 L. ed. 838, which reads: "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. \* \* \* (the result) is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources"; **United Leather Workers International Union v. Herkert & Melsel Trunk Company**, 265 U. S. 457, 68 L. ed. 1104, holding, "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture (by a strike, in that instance) is ordinarily an indirect and remote obstruction to that commerce. \* \* \* they (the strikers) did nothing which in any way directly interfered

## CONCLUSION

The conflict in decisions of the respective Circuit Courts of Appeals is manifest; the divergence of the decision of the Court below from decisions of this Honorable Court in the same general field is readily perceptible; the question whether the National Labor Relations Act shall continue to be expanded so as to envelop even local retail activities—clearly outside of its range—is important.

14 (Continued)

with the interstate transportation or sales of the Complainants' product"; **Federal Baseball Club v. National League of Professional Baseball Clubs**, 255 U. S. 200, 66 L. ed. 898, which reads: "It is true that, in order to obtain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give the exhibitions, the leagues must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business. \* \* \* the transport is a mere incident, not the essential thing"; **Moore v. New York Cotton Exchange**, 270 U. S. 593, 70 L. ed. 750, which reads: "If interstate shipments (of cotton) are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce"; **Hygrade Provision Company v. Sherman**, 266 U. S. 497, 69 L. ed. 403; **Interstate Amusement Company v. Albert**, 239 U. S. 560, 60 L. ed. 439, reading: "\* \* \* while interstate transportation of such actors might or might not become an incident or factor in the execution of the (local booking) contract, such interstate commerce was only incidental and not a part of the agreement as made between the parties." Compare, too, **Hump Hairpin Mfg. Co. v. Emmerson**, 258 U. S. 290, 66 L. ed. 622; **Small Company v. Lamborn & Co.**, 267 U. S. 248, 69 L. ed. 597; and **Armour & Company v. North Dakota**, 240 U. S. 510, 60 L. ed. 771, which latter case held interstate commerce not involved by a sale "distinctly by retail and in the package of retail, not in the package of importation."

The Petition for Writ of Certiorari should, therefore,  
be granted.

Dated at Omaha, Nebraska, September 30, 1944.

Respectfully submitted,

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**IN THE  
Supreme Court of the United States**

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— o —  
**October Term, 1944**

— o —  
**No. 385**

— o —  
**J. L. BRANDEIS & SONS,**

*Petitioner,*

**vs.**

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

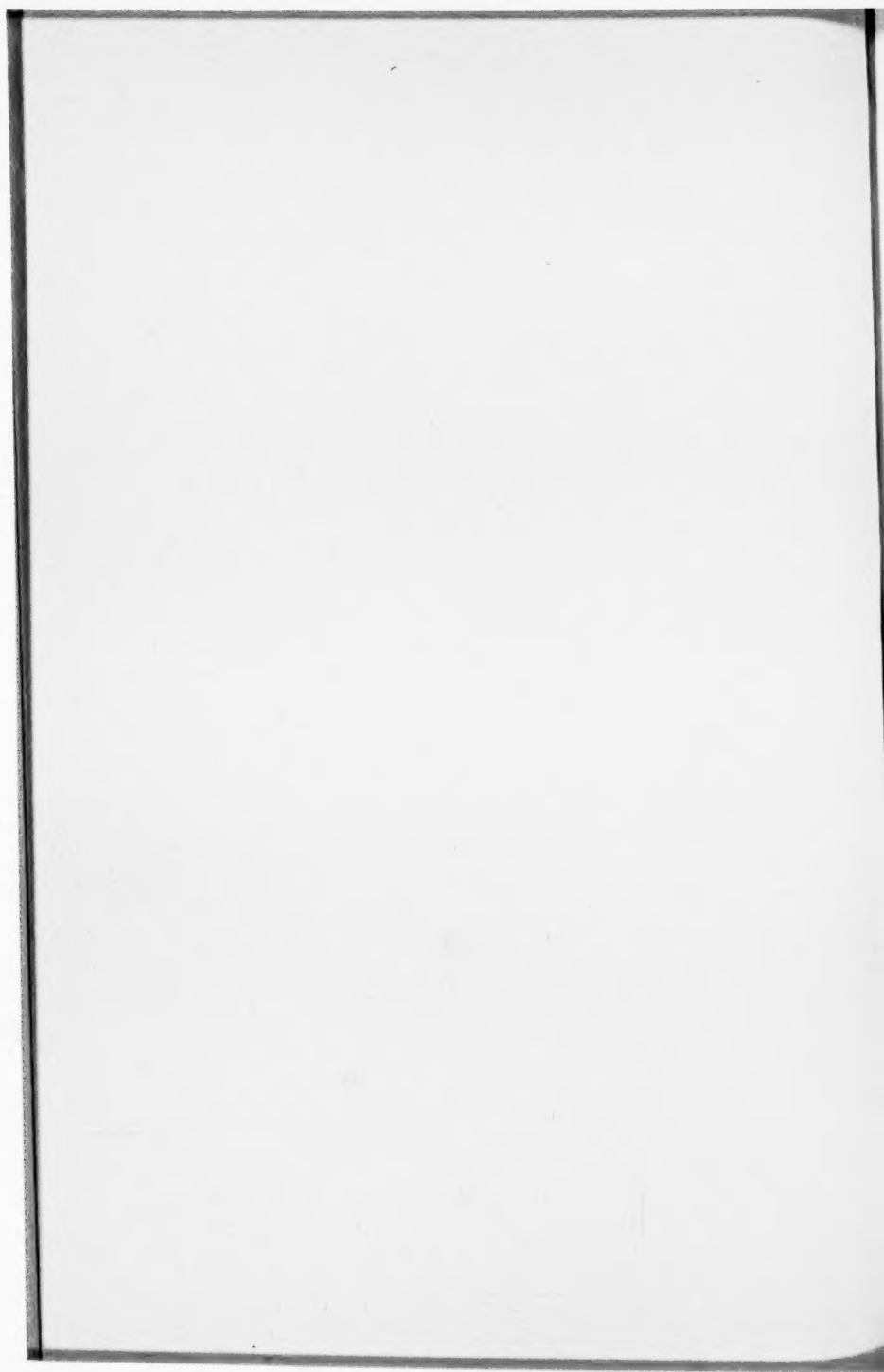
— o —  
**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

— o —  
**PETITION FOR REHEARING**

— o —  
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**IN THE**  
**Supreme Court of the United States**

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**October Term, 1944**

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**No. 385**

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**J. L. BRANDEIS & SONS,**

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**vs.**

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

---

**PETITION FOR REHEARING**

---

*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The Petitioner, J. L. Brandeis & Sons, respectfully submits this, its Petition for Rehearing, pursuant to Rule 33 of the Rules of this Honorable Court, and, in support of its Application to Vacate the Order of Denial of the Petition for Writ of Certiorari, heretofore entered, and to grant such Writ, respectfully shows:

## PETITION FOR REHEARING APPROPRIATE

Apart from the consideration that the Petition for Rehearing is a matter of right,<sup>1</sup> we suggest the instant Petition for Rehearing is appropriate in the light of the recent pronouncement<sup>2</sup> by this Honorable Court, particularly qualifying this case for rehearing. Like rehearings have been granted in cases indicated in the footnote,<sup>3</sup> particularly where an outstanding public interest has subsequently become manifest.<sup>4</sup>

## PRELIMINARY STATEMENT

The denial of Certiorari herein on October 16, 1944, fell with stunning impact upon the Retail circles of the

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1 *R. Simpson & Company, Inc., v. Commissioner of Internal Revenue*, 321 U. S. 225, 88 L. ed. (adv. ops.) 452, 64 S. Ct. 496.

2 *R. Simpson & Company, Inc., v. Commissioner of Internal Revenue*, supra, decided February 14, 1944, the Court saying:

"It sometimes is desirable in the light of events to grant a previously denied writ of certiorari, as where it appears the question must later be taken because of conflict. A grant in such a case not only enables us to do justice to the party if it appears that he has the right of the controversy, but also it gives us the benefit of argument and examination of the additional or contrary aspects of the question presented by the case."

3 *Buie v. United States*, 317 U. S. 689, 87 L. ed. 561, 63 S. Ct. 439; *Aguilar v. Standard Oil Company*, 317 U. S. 622, 87 L. ed. 504, 63 S. Ct. 433; *International Shoe Company v. Federal Trade Commission*, 279 U. S. 832, 73 L. ed. 982, 49 S. Ct. 478; *Olmstead v. United States*, 276 U. S. 609, 72 L. ed. 729, 48 S. Ct. 204; *United States ex rel. Robinson v. Johnston*, 316 U. S. 649, 86 L. ed. 1732, 62 S. Ct. 1301; *Schriber-Schroth Company v. Cleveland Trust Company*, 305 U. S. 47, 83 L. ed. 34, 59 S. Ct. 8; *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 280 U. S. 550, 74 L. ed. 608, 50 S. Ct. 152.

4 *Group No. 1, Oil Corporation v. Bass*, 282 U. S. 820, 75 L. ed. 739, 51 S. Ct. 88.

Nation,<sup>5</sup> particularly because of the realization that the denial of Certiorari was tantamount to the extension of coverage of the National Labor Relations Act to over four thousand like Retail Department Stores throughout the Nation, some twenty-five thousand other Retail outlets, and unnumbered thousands of merchants, the necessities of whose businesses required the stocking of their shelves from out-of-state sources. Local retail selling—for upwards of five years confidently assumed not to be within the influence of the Wagner Act, an assumption shared even by the National Labor Relations Board itself—had overnight assumed National aspects theretofore unheard of. The Retail Trade, accordingly, was profoundly amazed at the sudden enlargement of the orbit of Federal Control of Employment Relations.

### NEW QUESTIONS PRESENTED

It is earnestly submitted that, before such wholesale envelopment of the Retail Trade results, the question should, at least, have the benefit of pervasive discussion before this Honorable Court—especially in view of the array of conflicting philosophies of lower Court decisions portrayed in our original Petition for Writ of Certiorari, and the Brief and Reply Brief, respectively, in support thereof. The question is bound to recur again and again, and the Courts will be plagued with re-examinations of the issue in the other nine Circuits, including the Second and Fourth Circuits, where a conclusion, contrary to the deci-

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5 **Women's Wear**, Issue of October 17, 1944, " \* \* \* The Court appears to have consolidated the jurisdiction of the National Labor Relations Board over most, if not all, of the department stores. \* \* \*"; **On the Line**, publication of the American Retail Federation, Volume I, No. 9, Issue of October 21, 1944.

sion of the Eighth Circuit in this case, was reached.<sup>6</sup> The resultant confusion will be heightened by the very recent characterizations from this Court of retail operations, which point to a result opposed to that of the Eighth Circuit.<sup>7</sup> On every hand, it is evident that, for instance, the profession will not accept as final the startling assumption that 0.0024% of interstate sales is sufficient to confer jurisdiction upon the National Labor Relations Board.

But there are more immediate reasons why the Petition for Certiorari should be re-examined—

(1) Exemplifying the inexorable recurrence of the jurisdictional question, there is now before this Court, awaiting action, the identical jurisdictional question in *M. E. Blatt Company, Petitioner, v. National Labor Relations Board, Respondent*, No. 553, October Term 1944, involving a like department store.<sup>8</sup> Such case presents a question as to the jurisdiction of the National Labor Relations Board in every respect similar to the instant case. The reassertion of such question in the *M. E. Blatt Company Case* demonstrates—

*First:* That the question of the jurisdiction of the Board is still open and unsettled; and

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6 *Consolidated Edison Company v. National Labor Relations Board* (C. C. A. 2), 95 Fed. (2d) 390, 393, aff'd 305 U. S. 197, 83 L. ed. 126; *National Labor Relations Board v. White Swan Company* (C. C. A. 4), 118 Fed. (2d) 1002, cert. ret'd. unans'd. 313 U. S. 23, 85 L. ed. 1164.

7 *McLeod v. Threlkeld*, 319 U. S. 491, 494, 87 L. ed. 1538, 1541; *Walling v. Jacksonville Paper Company*, 317 U. S. 564, 570, 87 L. ed. 460, 467.

8 Certiorari being sought from the decision of the Circuit Court of Appeals for the Third Circuit in *M. E. Blatt Company v. National Labor Relations Board* (C. C. A. 3), 143 Fed. (2d) 268.

*Second:* That the question is of such public importance that it will, undoubtedly, continue to come before this Honorable Court time and again, until it is finally and definitely disposed of. Thus, "it appears the question must later be taken because of conflict," within the recent pronouncement of this Court considering the grant of a rehearing after the denial of Certiorari.<sup>9</sup>

(2) The National Labor Relations Board itself has taken cognizance of the immensity of what its legal department has wrought, and has, accordingly, recently published a decision retrenching the field of its operations and—most important in its impact upon this case—re-stated the jurisdictional norm or yardstick, differently than the decision of the lower Court in this Case. In the case of *In re McDonald Co-operative Dairy Company*, 58 N. L. R. B. No. 110, 15 L. R. R. 148, Issue of October 9, 1944 (and, therefore, since this case was lodged herein) the Board viewed the operations of a dairy products processing and distributing company, although not wholly unrelated to interstate commerce, as "essentially local in character" and, therefore, declined to assert jurisdiction, because out-of-state sales and purchases were not substantial in comparison to intrastate sales and purchases.<sup>10</sup> Thus, the National Board has introduced two new concepts into the jurisdictional investigation, namely, whether

9 *R. Simpson & Company, Inc., v. Commissioner of Internal Revenue*, *supra*.

10 The Board opinion reads: "While we do not find that the operations of the Company are wholly unrelated to commerce, in view of the essentially local character of the Company's business, we do not believe that the policies of the Act will be secured by asserting jurisdiction in this case. Accordingly, we shall dismiss the Petition."

the operations of the employer are "essentially local in character," and whether "out-of-state sales and purchases are substantial in comparison to intrastate sales and purchases." The Board has further conceded that "the operations of the Company may not be wholly unrelated to (interstate) commerce," and yet the business or the employer may be immune to the operation of the National Labor Relations Act.

The confusion is, consequently, compounded, as the dividing line is left by the Board to rest on an adjective. Yet, who would say, as the Press has inquired, that 0.0024% of interstate sales were substantial? Will this Honorable Court say that a retail department store of modest proportions is not "essentially local in character"? This case pre-eminently poses these questions of public importance.

In view of the vacillation of the Board itself upon this important question, this Court should finally, definitively and authoritatively receive and dispose of the question, to avoid inevitable administrative chaos.

(3) The public reactions to the denial of Certiorari on October 16, 1944, have been sufficiently portrayed to indicate that such denial has not served to settle the minds of the incredulous. The confusion has been heightened, rather than allayed. The field of "small business" has been profoundly stirred by the visualization of the train of competitive factors, which will ensue, as this

business or that business will seek to distinguish itself from the effect of the denial. The first reaction, that, even, the lowly peanut stand, stocking itself from outside of the state, comes under the Wagner Act, will give way to an opposite determination and a wide-spread effort at resurgence of exclusive state authority under the Little Wagner Acts of the several states. There will be no complacency with the indicated re-division of the regulatory field. "Small business" will assert itself. The disharmony, which will attend such effort, should now engage the attention of this Honorable Court to settle at the threshold the question of jurisdiction.

### CONCLUSION

The important area of the coverage of a Federal Act over a vast segment—perhaps the largest, at least, in point of number of employers affected—of the business of the Nation, in view of the foregoing new questions presented, should be re-surveyed with an eye to resolving the conflict in decisions of the lower Court and other Circuit Courts of Appeals and the dissonance of the lower Court's decision with many decisions of this Honorable Court, as set forth in our Original Brief and our Reply Brief.

We submit that, on such reinvestigation, the conflict and dissonance, respectively, will become patent, and that the urgency and propriety of grant of Certiorari will become evident.

WHEREFORE, Petitioner prays that the Order of Denial of Writ of Certiorari be vacated and that such Writ issue as heretofore prayed.

Respectfully submitted,

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We CERTIFY that this Petition for Rehearing is presented in good faith and not for delay.

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